CHAPTER 4

DIFFICULTIES AND CONCERNS ARISING FROM IMPLEMENTATION OF THE CONVENTION IN ITS CURRENT FORM

Introduction

4.1 While a number of submissions commented on the community concerns about Australia's lack of implementation of the Convention, others were concerned that the Convention may be implemented in a manner which did not support the family. Of particular concern were the implications for Australian families which may arise from various interpretations of a number of articles, particularly Articles 12 to 16. There was also considerable community concern expressed that this treaty would enable the Commonwealth Government to use its Constitutional power to encroach on State and Territory jurisdictions and over the potential loss of national sovereignty.[1]

General principles

4.2 Article 31 of the Vienna *Convention on the Law of Treaties 1969* provides that for the purposes of interpretation, a treaty shall comprise, in addition to the text, its preamble and annexes. In the *Convention on the Rights of the Child*, the Preamble outlines a series of principles including the rights of children, their entitlement to special care and assistance and the family as the fundamental group of society and that the child should grow up in a family environment. Also the general principles embodied in the text of the Convention such as non-discrimination, the child's best interests as a primary consideration, the right to survival and development and the right of the child to form and express views underpin all the other Articles in the Convention.[2]

Rights of the Child

4.3 The definition of 'children's rights' is particularly complex due in part to the diversity of the rights being asserted, but also because they may vary

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1 State and Territory jurisdictions and national sovereignty are dealt with in Chapter 1

2 Youth Advocacy Centre Inc, Supplementary Submission No. 14a, p. S 1030

depending on the context and the perspective of the person using the term.[3] Children's rights need to balance the interests of three key stakeholders: the independent interests of the child, the family and the State.[4] It was asserted that the implementation of the Convention ensures that children have a secure family life and opportunities to participate in their communities and deals with the tensions between adults and the child's world.[5]

4.4 The National Youth and Children's Law Centre argued that the rights outlined in the Convention are not exceptional and that these rights:

> ... have been accepted by communities for a very, very long time as being necessary and that recognise the developmental needs of children and that recognise the immaturity of children and allow them, however, to play an important part in the community.[6]

4.5 Ms Evatt added that many of these rights are available to children as they are for all people but their emphasis in the Convention means that boundaries need to be defined between 'parental influence and guidance' and child autonomy as they mature. She did not believe that the existing boundaries established in domestic legislation needed to be relocated in any significant way to accommodate the rights outlined in the Convention.[7]

4.6 The view was given that the relatively recent focus on children's rights has been attributed to the realisation of the extent of child abuse, the loss of faith by many in juvenile courts, schools and other institutions dealing with children, and the changing structure and role of families.[8] Dr Funder commented that many of the discussions on children's rights are about children in adverse or extreme circumstances such as children at risk or who are already in contact with the law of protection or juvenile justice.[9]

4.7 A recent study of community attitudes towards children's rights found that most Australians believe that children should have about the same rights as

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3 Manning F (1996) *Children's Rights*, NSW Parliamentary Library Research Service, Briefing Paper No 17/96, pp. 1, 7

4 Crass B (1992) 'The Limits of Public/Private Dichotomy: A Comment on Coady & Coady' in Alston P, Parker S and Seymour J (Eds) *Children, Rights and the Law*, Clarendon Press, p.142

5 The Victorian Council for Civil Liberties, Submission No. 23, p. S 115

6 Antrum, Transcript of Evidence, 5 August 1997, p. 1137

7 Evatt, Supplementary Submission No. 5b, p. S 3705

8 Wald M (1992) 'Children's Rights: A Framework for Analysis' in Krause H (Ed) *Child Law*, Dartmouth, p. 84

9 Funder, Transcript Evidence, 9 July 1997, p. 876

they currently hold or fewer rights.[10] Younger respondents and those with higher formal education were more likely to think that children should have more rights.[11]

4.8 During the development of the Convention, the United States of America supported the view that children had a right to expect certain benefits from their government and civil and political rights to protect them from abusive action of their Governments.[12] The United States considered that these rights were largely the same as those of adults although children may need direction and guidance from parents or legal guardians in the exercise of these rights.[13] This proposal continued the process of incorporating provisions from the *International Covenant on Civil and Political Rights* into the draft Convention.[14]

> The proposal reflects the recognition contained in the International Covenant that the ability of all individuals to exercise civil and political rights is not absolute, but is subject to certain limited restrictions that may be imposed by States. The proposal was designed to incorporate into the draft convention the right to freedom of expression, the right to freedom of association and to peaceful assembly, and certain privacy rights as elaborated in the International Covenant. The representative of the United States reminded the working group that these rights protect children from action of the State, and would not affect the legitimate rights of parents or legal guardians to provide direction and guidance to children.
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> 37. The idea of including civil and political rights in the draft convention to reinforce the protection of children was strongly supported by several participants. However, the legitimate rights of parents and tutors should be safeguarded, the balance between rights of children and rights of the family should be preserved and the wording of the article should be in line with the Covenants.[15]

4.9 It was asserted that some children's rights are inconsistent such as protective rights and autonomy rights.[16] There were a number of concerns within the community about children being given more rights. Hafen and Hafen stated that:

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10 Funder K and Smyth B, (1996) *Family Law Evaluation Project Parental Responsibilities: Two national surveys*, Australian Institute of Family Studies, p. 59

11 *ibid*

12 Report of the working group on a draft convention on the rights of the child, E/CN.4/1988/28

13 *ibid*

14 *ibid*

15 *ibid*

16 Manning F, *op cit*, pp. 4, 7

> ... recently increased procedural protections for United States children in juvenile courts, schools, and other settings are typically designed not to increase children's personal choices but to protect children against the abuse of unchecked adult discretion. Children's relative lack of adult-level capacity enhances the need for such protections ... The very concept of minority status, reflected in statutes in every United States jurisdiction, denies under age children choices on such matters. This denial is not a way of discriminating against children, but is a way of protecting them, and society, from the long term consequences of a child's immature choices and from exploitation by those who would take advantage of a child's unique vulnerability. To confer the full range of choice rights on a child is also to confer the burdens and responsibilities of adult legal status, which necessarily removes the protection rights of childhood.[17]

4.10 It was argued that children are not fully autonomous therefore others must ensure that the rights of the child are recognised, fulfilled and enforced.[18] This view included the concept that children must not be denied rights even if they cannot claim their rights for themselves and parents play a pivotal role in ensuring that children's rights are recognised.[19] It was also suggested that some viewed children's impotence as reason for setting up institutions that can monitor parents and guardians and intervene to enforce rights.[20]

4.11 Some rejected the notion of children as possessors of rights because children cannot assume the responsibility and obligations as their part of the social contract.[21] The traditional concept of independence and autonomy as central to rights is problematic in respect of children because it depends on their level of development and capacity to assume responsibilities and obligations.[22] The Liverpool Christian Fellowship Ltd believed that as it is impossible to give children rights as they cannot represent themselves, children's rights are government's rights over parents' rights.[23] They believed that giving children rights as outlined in the Convention was to deny parents the privilege of bringing up their children in the way they believe is best.[24]

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17 Hafen B and Hafen J (1996) Abandoning Children to their Autonomy: The United Nations Convention on the Rights of the Child' *Harvard International Law Journal* 37(2), p. 461

18 Manning F, *op cit*, p. 12

19 *ibid*, p. 4

20 *ibid*

21 *ibid*

22 *ibid*

23 Liverpool Christian Fellowship Ltd, Submission No. 631, p. S 3187

24 *ibid*

4.12 The Australian Family Association put the view that the family is the major buffer between the wider society and the child and a move towards autonomous action by children creates problems in the normal dynamics and functioning of the family.[25] There were concerns expressed, nonetheless, as to who would arbitrate in differences of opinion between children and care givers.[26]

The concept of the autonomous child

4.13 Ms Coady referred to the long debate in many countries about the extent and kind of freedom children should have.[27] She added that:

> During the 1960s and 70s there were many theoretical challenges to institutions such as the school and the family, as well as analyses of the changes in the concept of childhood over the centuries. The best known and most influential of the latter, although is has been challenged, is Phillippe Aries' *L'Enfant et la Vie familiale sous l'ancien regime*. At the same time the most dominant statement of children's rights was the United Nations declaration of the Rights of the Child, though its dominance was perhaps more in the lipservice paid to it rather than in the practice of the provisions.[28]

4.14 Hafen and Hafen traced the children's rights movement in the United States to the late 1800's but commented that this movement related to the protection and development rather than autonomous rights.[29] They argued that it was not until the 1970's that the liberationists sought legal rights for minors.[30]

4.15 Tonti-Filippini *et al* commented that in relation to the current trend from the concept of human dignity towards a concept of autonomy:

> Over time the human rights movement has evolved as we have moved further and further away from the atrocities which spawned the movement as a moral reaction, and the memory that saw a clear need for a moral law above civil law. In our time and in Western culture, the liberal notion of autonomy is displacing the notion of human dignity as the equal worth indeed the sacredness and inviolability of every member of the human family, which formed the basis of the International Bill of Human Rights. Increasingly, that a person chooses is considered a sufficient measure of worth of the object of

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25 Santamaria, Transcript of Evidence, 9 July 1997, p. 894

26 *ibid*, p. 897

27 Coady, Submission No. 708, p. S 3559

28 *ibid*

29 Hafen and Hafen, *op cit*, p. 452

30 *ibid*, p. 453

> the choice. If a person sells him or herself into the slavery of drug abuse, or sexual addiction in any of its forms, or works as a prostitute or opts for death, then this choice is to be respected.[31]

4.16 Tonti-Filippini *et al* went on to say that there was conflict in accepting the autonomy principle as paramount at the time of the development of the Convention particularly in relation to Articles 12 - 16 and 18 on freedom of expression, education, religion, freedom of association and privacy.[32] Ms Coady argued that the Convention does not suggest that the child should be regarded as completely autonomous.[33] She believed that children's rights were 'carefully qualified by statements about the role of the family'.[34]

4.17 Ms Evatt added that the rights expressed for adults in other international instruments are also available for children and that this Convention acknowledges the role of parents and families in directing and guiding the child in the exercise of those rights.[35] The Human Rights Committee also stated that children already benefit from all of the articles in the *International Covenant on Civil and Political Rights* (ICCPR).[36] The ICCPR and *Covenant on Economic Social and Cultural Rights* contain articles which relate to special measures for the protection of children. Ms Evatt believed that these articles present a balance between protection and autonomy that is not changed by the *Convention on the Rights of the Child* and that the Convention clarifies some issues.[37]

> For a person in his or her formative years, lack of knowledge, intellectual capacity, maturity and experience are factors that mean that his or her dignity will most adequately be safeguarded within a family in which the parents are custodians and protectors of his or her rights and freedoms. The extent to which the child is permitted autonomy is a matter of prudential judgment as the child matures. (This is recognised in the CRC at Art. 5). The concept of dignity as a matter of respect for the sacredness and inviolability of the person, rather than of autonomy better fits the protection of the child in his or her family ... The CRC is a statement about parents and families within which the

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31 Tonti-Filippini, Fleming, Fisher, Krohn and Coghlan, Submission No. 187, pp. S 1265-6

32 *ibid*, p. S 1267

33 Coady, Submission No. 708, p. S 3561

34 *ibid*

35 Evatt, Supplementary Submission No. 5b, p. S 3706

36 Thirty-fifth session, 1989, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN.Doc HRI\GEN\1\Rev.1 at 23 (1994), p. 23

37 Evatt, Supplementary Submission No. 5b, p. S 3706

> child originates and on whom the status, identity, security, well-being and development of the child depends.[38]

4.18 Professor Hafen supported the 1924 and 1959 declarations and those aspects of the *Convention on the Rights of the Child* relating to protection, development and improved nutrition, safety and education particularly protection from drug abuse, child neglect, a healthy environment, children in armed conflict and the special needs of disabled children.[39] However, he believed that the Convention breaks new ground which has never been in United Nations treaties nor has it ever been part of the law of any country in this form.[40] He was of the view that:

> ... these avant-garde thinkers about liberation ideology wanting to free children from all legal restraints failed in the US, took their idea to the international human rights forum, where the idea was less critically examined ... It is just that nobody wanted to be against human rights.[41]

4.19 Professor Hafen added that the 'choice rights' concept included in the Convention were not incorporated in the ICCPR:

> ... the ICCPR itself provided in 1966 in its Article 24 that "every child shall have the right to such measures of protection as required by his status as a minor, on the part of his family, the society and the state." This language reflects the traditional notion of "protection rights" for children as the basis for whatever the ICCPR granted children. The ICCPR also explicitly acknowledges children's minority status, which by definition prevents the exercise of minors' "choice rights" until they reach fixed statutory ages, regardless of their individual "evolving" capacity ... The CRC, on the other hand, defines "child" in Article 1 as "every human being below the age of 18," suggesting that it speaks in "choice rights talk" for the first time to those having minority legal status. If the civil rights embodied in the ICCPR had applied to children, much of the CRC would have been redundant - and the CRC's authors would never have claimed they were adopting a "totally new right" for children.[42]

4.20 Although the Convention was developed over a decade, Professor Hafen commented on the 'blinding speed' of the Convention's acceptance and was of the view that the Convention was adopted by the international community uncritically without realising it embodied the concept of the autonomous

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38 Tonti-Filippini, Fleming, Fisher, Krohn and Coghlan, Submission No. 187, p. S 1268

39 Hafen, Submission No. 666, p. S 3460; Hafen and Hafen, *op cit*, pp. 450, 458

40 Hafen, Transcript of Evidence, 9 May 1997, p. 343

41 *ibid*, p. 345

42 Hafen, Submission No. 666, pp. S 3462-3

child.[43] However, it was argued in a number of submissions that the Convention was developed over a decade and has been ratified by 191 countries. Ms Coady believed that this assumed 'an amazing gullibility' of those participating in the process and argued that the views of the extreme liberationists have not materialised in the Convention.[44]

4.21 Professor Hafen went on to say that the autonomy argument has been tested in the American court over two decades and did not prevail except in a few cases.[45] He commented that with the exception of abortion choices and the right to obtain contraceptives by minors found to be mature, virtually all of the modern American children's rights cases have been concerned not with children's rights of autonomous personal choice, but with their rights to protection.[46] He argued that the court favoured the view that children's rights cannot be equated with those of adults[47] although some children's rights have been embraced the United States legislation and social rhetoric.[48]

4.22 Professor Hafen argued that several proponents of the Convention used the word 'autonomy' to describe the new 'personality' or 'participation' philosophy reflecting the fact that children have identical rights to adults which is significantly different from the 1959 Declaration.[49] He added that the Convention is based on choice rights rather than needs and replaces the 'integrative' approach of the Declaration with the child's autonomy and freedom of control particularly in Articles 13-16.[50]

4.23 Ms Dolgopol considered that:

> Articles 13 to 16 contain rights which have been deemed fundamental to the protection and promotion of human rights for several centuries. Included are the right to freedom of speech, the right to freedom of religion, the right to privacy and the right to freedom of association. These rights are often referred to as "freedom from" rights, that is rights which are protected from arbitrary interference from the State. Similar rights are protected in the United States Constitution, the French Declaration on the Rights of Man, the European Convention on Human Rights, the American Convention on Human Rights

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43 Hafen and Hafen, *op cit*, p. 449; Hafen, Transcript of Evidence, 9 May 1997, p. 343

44 Coady, Submission No. 708, p. S 3560

45 Hafen, Submission No. 666, p. S 3459

46 Hafen and Hafen, *op cit*, pp. 454-5

47 *ibid*, p. 454

48 Hafen, Submission No. 666, p. S 3460

49 *ibid*, p. S 3462; Hafen and Hafen, *op cit*, pp. 451, 467-75

50 *ibid*

> (document of the Organisation of American States); the African Charter on Human and Peoples Rights, the UN Universal Declaration of Human Rights and the UN Covenant on Civil and Political Rights.[51]
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> In all of the international and regional instruments these rights are phrased in the following terms: "Everyone, Every person, Each individual, No one." In addition these instruments protect everyone from any form of discrimination, which would include discrimination based on age. Thus at the time the Convention on the Rights of the Child was being debated and discussed, there was no question but that these rights were rights already held by children and young people.[52]

4.24 In relation to the *Convention on the Rights of the Child*, Mr Francis QC argued that the document came from the radical libertarians who saw the family as an obstacle to the progress and development of the child and that they received a lot of support from the old communist governments in eastern Europe as the Convention gave the State and not the parent the right to determine what was in the best interest of the child.[53]

> It was put to the UN as a fait accompli. It received very little attention when it was laid on the table in the UN, and the nations rushed up like so many lemmings to sign and ratify it without an understanding of what was in it ... of all of the nations in the UN there are only about 21 democracies ... as we understand democracy.[54]

4.25 The NGO Informal Ad Hoc Group on the Drafting of the Convention on the Rights of the Child attempted to have greater recognition of the family incorporated in the Convention and proposed a new article to deal with the importance and role of the family:

> *Although different aspects of the importance of the role of the family are dealt with in various articles, it was felt that the fundamental significance of the parent-child relationship justifies the inclusion of an article devoted solely to this issue. If such an article were to be included, it was felt that its most appropriate position would be immediately preceding the article on social security and standard of living.*
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> 1. The protection of the child's interests cannot be dissociated from the protection of the child's natural family.
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> 2. The responsibility of parents is to do everything in their power to ensure their children's well-being and harmonious development. Parents shall

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51 Dolgopol, Submission No. 726, p. S 3606

52 *ibid*

53 Francis, Transcript of Evidence, 10 July 1997, p. 1048

54 *ibid*, pp. 1048-9

> participate in all decision-making and orientation with regard to their children's education and future.
>
> 3. The States Parties to the present Convention undertake to recognise, support and protect the family unit in every way to enable it to carry out its function as provider of the most suitable environment for the child's emotional, physical, moral and social development.[55]

4.26 Ms Dolgopol also explained that the Human Rights Internet was the only United States non-government organisation involved in the group of 40 NGOs[56] and that it was the United States Government which was instrumental in having extensive rights for children incorporated in the draft Convention.[57]

4.27 Professor Hafen was of the view that legislation in every United States jurisdiction denies under-age children independent choices to protect them and society from immature choices and exploitation because of their vulnerability. He suggested that giving children the full range of choice rights will remove the protection rights of childhood and confers the burdens and responsibilities of adult legal status.[58]

4.28 He believed that the concept of the autonomous child is embodied in Articles 3, 5, 9, 13-16 and that this should be rejected by the world.[59] His research has not shown that children have increased capacities to assume the responsibility of being autonomous persons, legally or socially.[60] He believed that the autonomous child concept has never been adopted in the United States although in the 1970's it was considered carefully and sympathetically in many courts and legislatures.[61] He rejected the concept on the grounds that it is not in the interests of children or parents or society to suddenly treat children as autonomous legal persons.[62]

4.29 Ms Coady argued that the emphasis in the Declaration on the Rights of the Child on the vulnerability of the child and the need for protection is a limited view which enhances the adults power and the child's 'feeling of

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55 Dolgopol, Transcript of Evidence, 17 April 1998, p. 1575

56 *ibid*, p. 1572

57 Report of the working group on a draft convention on the rights of the child, E/CN.4/1988/28

58 Hafen and Hafen, *op cit*, pp. 449-491

59 Hafen, Transcript of Evidence, 9 May 1997, p. 343

60 *ibid*, p. 344

61 *ibid*

62 *ibid*

passivity and incompetence'.[63] She commented that in the United States at that time, the debate on children's rights had two extremes: one was the liberationists view in which some even suggested that children should have a right to vote as cited by Professor Hafen; and at the other end of the spectrum was the view that parents had 'not only a right but a religious duty to literally use the rod against the child'.[64] She believed that the Convention represented a balance between these two extremes.[65]

4.30 Ms Coady argued that the Convention does not suggest that the child should be given complete autonomy but that children should have rights as well as protection.[66] She expressed the view that these rights are qualified by statements about the role of the family particularly in the freedom of religion and in the Preamble as well as other articles.[67] She also added that the abandonment of children usually occurs when the parents are under financial or other stress and there is a role for governments in supporting those parents.[68] This can be assisted by relief from economic uncertainty, access to higher education, medical care, child care and family support services.[69]

The family as the fundamental unit of society

4.31 The ratification of the *Convention on the Rights of the Child* committed the Government to supporting the family as the fundamental unit of society and developing policies that protect the family unit as the best environment for children to grow up in.[70] The importance of the role of the family is also reinforced in preambular clauses 5 and 6 and articles 7, 16, 18, 24, 27, 29 and 37.[71]

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63 Coady, Submission No. 708, p. S 3559

64 *ibid*

65 *ibid*

66 *ibid*, p. S 3561

67 *ibid*

68 *ibid*, p. S 3564

69 *ibid*, p. S 3565

70 Tonti-Filippini, Fleming, Fisher, Krohn and Coghlan, Submission No. 187, p. S 1271; Call to Australia, Submission No. 179, p. S 1202; Krohn, Transcript of Evidence, 9 July 1997, p. 833; Kaye, Transcript of Evidence, 4 August 1997, p. 1085; Burdekin, Transcript of Evidence, 5 August 1997, p. 1292; McCorquodale, Transcript of Evidence, 29 April 1997, p. 162; Burnside, Submission No. 94, p. S 451; Premier of Queensland, Submission No. 144, p. S 947; Bayes, Transcript of Evidence, 28 April 1997, p. 84; Dolgopol, Transcript of Evidence, 4 July 1997, p. 663; Community Services Australia, Submission No. 154, p. S 1023

71 Attorney-General's Department, Submission No. 133, pp. S 766-7

4.32 The National Children's and Youth Law Centre commented that parents are referred to beneficially in 11 of the operational articles of the Convention and they stand to benefit as a result of the implementation of a number of other articles.[72] They contend that the Convention is not anti-family and it is not anti-parent.[73]

4.33 Article 5 states that:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

4.34 Australia was instrumental in incorporating the notion of the 'evolving capacities' of the child and the rights and duties of parents to provide guidance to and take primary responsibility for the child into Article 5.[74] The Australian Government at the time believed that Article 5 was sufficient to protect parents rights.[75]

> No caring Australian parent need be concerned that the Convention will diminish in any way the traditional role of parents and guardians. The Convention recognises the family as the fundamental unit of society, and indicates the responsibility of governments to safeguard the welfare of children where parents and others responsible fail to do so.[76]

4.35 The Council of Family considered that every child has an inalienable right to a family which can provide children with identity, status and security.[77] The rights of the child are enmeshed with the rights of the family as the family incorporates the children and is not opposite to children.[78] The rights of parents and children should be complementary and not seen to be in conflict with each other.[79] Child and Youth Health in South Australia appreciated the importance

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72 National Children's and Youth Law Centre, Submission No. 321, p. S 1774

73 *ibid*

74 Detrick S, *op cit*, pp. 157-9

75 Tate M, Minister for Justice and Consumer Affairs, Questions Without Notice, United Nations Convention on the Rights of the Child, *Senate Hansard*, 18 December 1990, p. 5863

76 Evans, G Minister for Foreign Affairs and Trade, *News Release* No. M199, 21 November 1989, United Nations Convention on the Rights of the Child

77 Council for Family, Submission No. 185, p. S 1245

78 Elliott, Transcript of Evidence, 6 August 1997, p. 1317

79 Curran, Transcript of Evidence, 9 July 1997, p. 882; Gledhill, Transcript of Evidence, 9 May 1997, p. 412; Burnside, Submission No. 94, p. 451; Wight, Transcript of Evidence, 1 May 1997, p. 256

of families in providing protection, love and nurture to children and work in partnership with the families.[80]

4.36 It was suggested that children can be supported by supporting parents and enhancing community attitudes which value children and the Government has some responsibility for policy planning and coordination of standards and for monitoring these.[81] The Council of Family added that the community and government have responsibilities in assisting families and this may include the provision of marriage and relationships education, family support services, recognition of the costs of child rearing through the tax system and employment arrangements that allow flexibility for parents.[82]

4.37 However, Professor Hafen expressed the view that:

> ... the language of Article 5 subtly but significantly limits parental influence to "a manner consistent with the evolving capacities of the child." The law has always used age limits to measure when certain legal privileges are extended to children ... But the writings of the children's liberation advocates make clear that they favour individual determinations of capacity ... The subjective notion of individual "evolving capacity" as a legal standard is a new concept - it has never before been included in general legal policies dealing with children.[83]

4.38 Hafen and Hafen also added that:

> Despite only limited recognition for child autonomy as a legal concept, the approach of US law and society to children's issues over the past thirty years has clearly experienced a rhetorical shift that carries autonomy overtones. The language of several key court opinions and of some of the recent scholarship in this field has thus increased our collective sense about the independent personhood of children ... legal scholarship has drawn meaningful distinctions between younger and older children, showing that adolescence is a "learner's permit" stage of life in which parents and the state should and do grant children increasing degrees of freedom as a way of developing their capacities.[84]

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80 Les, Transcript of Evidence, 4 July 1997, p. 682

81 Defence for Children International Australia (1996) *Australia's promises to children - The Alternative Report,* p. 13

82 Council for Family, Submission No. 185, p. S 1246

83 Hafen, Submission No. 666, p. S 3464

84 Hafen and Hafen, *op cit,* pp. 455-6

Parental guidance

4.39 Ms Mason stated that the Convention does not abrogate the rights of parents nor was it intended to be an alternative to parents and their authority.[85] She added that Article 5 underlines the responsibilities of parents, the extended family, the school, the community and the government in the 'provision of guidance and direction to children, according to their evolving capacities'.[86]

> It recognises that, while the child, being a subject of human rights, like any other person - an adult, in other words - is intended to be able to give voice to his opinions according to his age and maturity, it does not say that a child has the right to talk when he feels like it or that the child has a right to talk back to his parents and demand things ... At no time does the convention seek to allow the child to take the place of the parent or to rule his own life ...[87]

4.40 The Human Rights and Equal Opportunity Commission believed that the Convention recognises the important role of families and parental guidance in protecting children's rights in the preamble which refers to the family as the fundamental group of society and the natural environment for the growth and well being of its members.[88] HREOC added that Article 5 which refers to the responsibilities, rights and duties of parents to provide appropriate guidance to a child, consistent with that child's evolving capacities, should be respected and Article 18 gives parents joint responsibility for raising children and that the State shall support them.[89] The Commission argued that these and other articles negate arguments that the Convention undermines the role of parents and families.[90]

4.41 Ms Evatt believed that the requirement that States Parties respect the 'responsibilities, rights and duties of parents to provide direction and guidance' in a manner consistent with the evolving capacities of the child clearly puts the exercise by the child of his/her rights under parental guidance, while allowing for the fact that children develop physical, moral and legal capacities by gradual stages as they approach adulthood.[91] Article 5 is important because of the role it affords to parents and the recognition it provides the extended family is much

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85 Mason, Transcript of Evidence, 3 September 1997, p. 1527

86 *ibid*

87 *ibid*

88 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1876

89 *ibid*, pp. S 1876-7

90 *ibid*, p. S 1877

91 Evatt, Supplementary Submission No. 5a, p. S 1559

greater than that embodied in domestic legislation such as the *Family Law Act 1975*.[92]

4.42 The House of Lords in 1986 found that parental rights to control a child were for the benefit of the child not the parent and are only justified to the extent that they enable the parent to perform their duties for the children in the family.[93]

4.43 Burnside also commented that:

> We do not see the convention as affirming the rights of children versus the rights of parents. Parents' rights, as we see them are derivative rights. We would argue that the new amendments to the Family Law Act and a number of decisions here and in the United Kingdom basically have ruled that parents' rights arise from their responsibilities to their children and their responsibilities to nurture and support their children and that they have the rights necessary in order to do that. Gillick and Marion's case, and a number of other cases, would say that once you are no longer needed in that role then the rights basically begin to drop off. In that sense, we would still say that they are very important rights and that the convention basically supports and buttresses those rights and the rights of families to access services and those types of rights in particular.[94]

4.44 Ms Dolgopol submitted that many jurisdictions acknowledge the limitations on the extent to which parents can make decisions on behalf of their children.[95] She cited the *Nielsen v Denmark* in the European Court of Human Rights, *Secretary Department of Health and Community Services v JWB and SMB (1992)* in the High Court of Australia and *Polovchak v Meese* in the United States of America.[96]

4.45 Professor Hafen believed that the concept of evolving capacity is already evident in the age limits which apply to driving and other things.[97] However, Ms Evatt commented that 'evolving capacity' is already recognised in relation to some family law matters and criminal responsibility.[98]

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92 International Law Teachers, The University of Melbourne, Submission No. 188, p. S 1291

93 *Gillick v West Norfolk* AHA [1985] 3 WLR per Lord Fraser 841 cited in International Law Teachers, The University of Melbourne, Submission No. 188, p. S 1291

94 Bendall, Transcript of Evidence, 9 May 1997, p. 419. See also Hafen B and Hafen J, *op cit*, p. 473.

95 Dolgopol, Submission No. 726, p. S 3610

96 *ibid*

97 Hafen, Transcript of Evidence, 17 April 1998, p. 1585

98 Evatt, Transcript of Evidence, 17 April 1998, p. 1585

4.46 Ozchild stressed that children's rights are not just about their economic well being but are a combination of inalienable rights which are not about taking away other rights or reducing the responsibility of parents and families or breaking up families and the Convention states the importance of the family unit in caring for the child.[99]

4.47 Ms Coady expressed the view that parental fiduciary rights are rights to look after the rights of children but if the parents consistently act in a way that harms the child then they must forfeit that right.[100]

Best interests of the child

4.48 This guarantees protection and care for the child's well being, taking into account the rights and duties of the parents or those legally responsible. In *Marion's* case in the High Court, it was determined that:

> ... parent's legal rights over their children are not absolute and some decisions have some important implications for fundamental human rights that a higher authority should determine if they are in the child's best interests.[101]

4.49 Mr McCorquodale explained that the 'best interests of the child' is not defined. This does not make it very easy from a legal or political perspective and each jurisdiction needs to clarify the situation. This flexibility allows some, but not absolute, discretion.[102]

> Some would criticise the concept of best interest for not being child autonomy focused enough, saying that decisions should be made in accordance with wishes of children. But it does not say that at all, it says 'best interest of children'. Now with 'best interests of children' is a decision that somebody else makes about the interests of the child ... it is an autonomy which is not an absolute autonomy in relation to children, you are talking about a whole range of things that need to be taken into account in determining best interest. That is part of Australian law quite apart form the convention. So to say that somehow the convention imposes something on Australian law that was not there already is, quite frankly, sheer nonsense in both of those instances.[103]

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99 Ozchild: Children Australia, Supplementary Submission No. 413a, p. S 3403

100 Coady M (1996) 'Reflections on Children's Rights' in Funder K (Ed) *Citizen Child Australian Law and Children's Rights,* Australian Institute of Family Studies, p. 22

101 Manning F, *op cit*, p. 13 citing Cashmore J and Castell-McGregor S (1996) 'The Child Protection and Welfare System' in Funder K (ed) *Citizen Child: Australian Law and Children's Rights*, Australian Institute of Family Studies, p. 114

102 McCorquodale, Transcript of Evidence, 29 April 1997, p. 162

103 Gurr, Transcript of Evidence, 9 May 1997, p. 357

4.50 It was argued by Ms Gurr that in domestic law the best interests of the child is a paramount consideration which is stronger than in the Convention.[104]

4.51 Children are not always in the best position to know what is in their best interests and the Convention states that parents have the principal role in the care of children.[105] It was argued that:

> Article 3 of the Convention, therefore, does not support Professor Hafen's argument. On the contrary, the "best interests" principle has been criticised as being fundamentally at odds with the idea of children's autonomy rights, implying as it does that the right of someone other than the child to make paternalistic judgments.[106] It is seen to be grounded in "protection and welfare" rather than autonomy.[107]

4.52 Ms Evatt argued that the inherent *parens patriae* jurisdiction of the State Supreme Courts has long been recognised in Australia and the power related to the principle that the welfare of the child is the paramount consideration.[108]

Concerns about the interpretation of 'best interests' principle

4.53 There was support for the 'best interests' principle to be defined in law.[109] The best interests of the child is used very broadly across all services.[110] The Children's Commissioner of Queensland told the Committee that:

> Article 3, which deals with the concept of the best interests of the child, seems to be used often in a paternalistic manner to justify almost any action which a particular officer or professional favours. It tends to be invoked within rather narrow confines without being seen in a broader perspective where account is taken of all other relevant factors and a reasonable balance struck.[111]

4.54 It was submitted that the Government continually needs to look at ways of supporting workers who need to interpret this principle in non-legislative environments such as child welfare agencies, child care and education

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104 *ibid*, p. 357

105 Kaye, Transcript of Evidence, 4 August 1997, p. 1085

106 See for example, Eekelaar J and Freeman M (1991) in Alston and Brennan (eds*) The UN Children's Convention and Australia* HREOC, ANU Centre for International and Public Law and ACOSS

107 Evatt, Supplementary Submission No. 5a, p. S 1559

108 *ibid*, p. S 1558

109 Defence for Children International Australia, *op cit*, p. 17; Alford, Transcript of Evidence, 1 May 1997, p. 227

110 Nilsson, Transcript of Evidence, 1 May 1997, p. 242

111 Alford, Transcript of Evidence, 1 May 1997, p. 227

settings.[112] There is often a vast difference between the law and practice in child protection cases. [113]

> Focusing on the legal proceedings where children are involved as victims of child sexual abuse reveals that the power resides with the adults in the process of the law. Truth and Justice and the 'best interests of children' are virtually flattened. Parenting issues are ignored as the 'accused' gets a 'fair' trial. Is it a surprise that most social workers advise that the pain and the suffering of the original abuse will be substantially added to if legal proceedings follow? Article 16, parts 1 and 2 are ignored in courts of law.[114]

4.55 It was also suggested that some States have an 'extremely poor record' in acting in the best interests of the child. Concern was expressed that:

> Inappropriate decision-making has lead to child suicide, homelessness and the deprivation of parents of access to their children due to inappropriate removal of children without proper basis. Agencies must employ appropriately trained and experienced staff and the focus should not always be on removal but be on supporting families or educating families unless of course the child is at risk of sexual or other abuse.[115]

4.56 The ACT Grandparents Support Group saw the 'best interests of the child' as a 'motherhood' statement which is interpreted by an adult and which has almost as many interpretations as there are adults to enforce it.[116] The NGOs agreed that the principle of 'best interest' is frequently misapplied or applied in a paternalistic manner by governments and courts.[117] Professionals may also have opposing views of what is in the best interests of a particular child.[118]

4.57 Further, the NGOs argued that this provision is used to override the child's views or justify expulsion from school or the detention of juveniles with adults.[119] Another concern was that service delivery and approaches to counselling are only available through parents.[120]

4.58 The Youth Advocacy Centre Inc stated that:

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112 Australian Institute of Family Studies, Submission No. 363, p. S 2067

113 Ballarat Children's Homes and Family Services Inc, Submission No. 162, p. S 1093

114 *ibid*

115 Catholic Commission for Justice, Development and Peace, Submission No. 201, p. S 1369

116 ACT Grandparents Support Group, Submission No. 127, p. S 694

117 Defence for Children International Australia, *op cit*, p. 16

118 Lutheran Community Care, Submission No. 61, p. S 313

119 Defence for Children International Australia, *op cit*, p. 16

120 *ibid*

> The greatest barrier to decisions being made in the best interests of the child is the child's difficulty in being heard. It is our contention that this Article must be read in conjunction with Article 12. This means providing children old enough and mature enough with **an advocate**, not a separate representative who has no direct responsibility to the child.[121]

Concerns that the Convention restricts parental guidance

4.59 At the time of ratification of the Convention, the then Opposition approved of the general thrust of the Convention but had significant concerns about the lack of strong statements about the concept of parental control and parental rights over their children.[122] This was echoed in the large number of petitions tabled in the Australian Parliament by various Members and Senators which expressed concern at the scope of rights given to children by Articles 12 to 16. Some petitions stated that this could result in a Government assisted rebellion against parents establishing limits for their children in the child's best interests.[123]

4.60 It was suggested that giving additional rights to some people virtually implies taking some rights away from somebody else.[124] The Coalition for the Defence of Human Life also believed that in considering children's rights, interests and advocacy then you are undermining parental rights.[125]

4.61 It was also suggested that the provision in Article 5 to provide direction and not control the child, limited all parental rights to those consistent with the evolving capacity of the child.[126] Mr Khor interpreted Article 5 as heavily qualifying parents' rights to the extent that it rendered them 'ineffectual and subservient' to the rights of the child.[127] Concern was also expressed that Article 5 was inadequate in protecting the pre-eminent role of families and the inalienable rights of parents to raise their children according to their values and beliefs.[128]

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121 Youth Advocacy Centre Inc, Supplementary Submission No. 14a, p. S 1033

122 Peacock, House of Representatives, *Hansard*, 21 February 1991, p. 1078

123 For example, Senate, *Hansard*, Petitions, 27 September 1993, p. 1155

124 Eastwood, Transcript of Evidence, 3 July 1997, p. 614

125 Egan, Transcript of Evidence, 3 July 1997, p. 649

126 Francis C (1997) *The 1989 UN Convention on the Rights of the Child A Threat to Christian Civilisation* Zurich - March 1997, p. 6

127 Khor, Submission No. 623, p. S 3168

128 Parents and Friends Federation of Western Australia Inc, Submission No. 145, p. S 963

4.62 Mr Zammit also expressed his concern that the Convention enabled government departments to override parental decisions.[129] The Wall family believed that as the full Family Court claimed ultimate jurisdiction over all children of married couples in Australia, the Court was able to hear cases to enforce children's autonomy 'rights' against parents.[130]

4.63 Hafen and Hafen commented that:

> Whatever the drafters' understanding about state versus familial paternalism, their document resolves too many tough issues by erring on the side of children's autonomy. This stance places the full weight of the United Nations behind the idea that parents and other adult caregivers should leave children alone, letting them speak for their own welfare and choose for themselves how their needs should be met. This approach confuses children's needs for nutrition, education and protection ... with children's alleged right to make autonomous choices. Such confusion can undermine children's most basic needs. The drafters evidently wished to use avante-garde terminology that seems to place the United Nations on the cutting edge of human rights thinking, but they have failed to see the distinction between the applications of that terminology to adults and its applications to children.[131]

4.64 Ms Coady, however, added that:

> In cases where there are serious differences in opinion between the child and the parents, it does seem appropriate that the state, either through the courts or an ombudsman, should play a role in settling the dispute, possibly by deciding that the child is competent to make a decision. There are of course other sources which may be able to settle such disputes. There are relatives, neighbours, friends, schools and churches, and these various groups are usually the mediators in such cases. But where the dispute is serious and unresolved in these other ways, the state's representatives of a more impartial solution.[132]

4.65 Ms Coady also commented that while children could seek a State view on the reasonableness of a parental conduct, the investigation would not proceed without evidence of abuse as defined in domestic legislation.[133] Ms Jones was of the view that when the point is reached where a family breakdown occurs or the child is going to become homeless, or even conflict over a school uniform or going to church arises, it is not going to survive as a family unit unless help

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129 Zammit, Submission No. 424, p. S 2540

130 Wall, Submission No. 466, p. S 2684

131 Hafen and Hafen, *op cit*, p. 486

132 Coady, Submission No. 708, p. S 3564

133 *ibid*, p. S 3566

is provided in some form.[134] Family and child mediation and counselling services are provided to resolve disputes and research is being conducted into the involvement of children in these services.[135]

4.66 Ms Dolgopol commented that:

> None of us can shy away from the fact that parents and children may disagree about particular issues. The more serious the disagreement the greater the potential for it to have negative consequences for family relationships. It is in the interest of everyone that the State provide assistance to resolve these disputes. This is why funding for counselling and mediation services remains a crucial issue of concern. As a society we should assist families to resolve these issues for themselves.[136]

4.67 In relation to the concerns of those who believe that the Convention provides children with rights ahead of those of parents, Professor Kolosov commented that:

> ... it is not the committee's approach, it is the convention's approach. The convention was drafted with the active participation of the state of Australia. In articles 12 to 16 the convention recognises the right of parents and legal guardians to guide the child. It recognises the right of every child to express his or her own opinion, which is to be given due weight by the parents and legal guardians and by the respective authorities - either the courts or administrative authorities. But all that, which is reflected in article 12, should be in a manner consistent with the procedural rules of national law so there is no limitation of either national legislation or national traditions with regard to bringing up and educating children.[137]

4.68 There was considerable concern that the Convention also enabled the government to be more intrusive and take over the role of families.[138] Professor Hafen also expressed his concern that:

> The language of the convention can change the basis for state intervention into functioning families. The language can change from traditional age limits to subjective determination based on the evolving capacity of the child, which is a dangerous and completely unproven concept. The experience in the US with the notion of subjective determinations of a child's maturity to make a choice is all negative. Judges cannot evaluate capacity on an individual basis. It

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134 Jones, Transcript of Evidence, 5 August 1997, p. 1206

135 Attorney-General's Department, Submission No. 133, p. S 779

136 Dolgopol, Submission No. 726, p. S 3610

137 Kolosov, Transcript of Evidence, 3 September 1997, p. 1526

138 Dimitriou, Transcript of Evidence, 4 August 1997, p. 1098; Muehlenberg, Transcript of Evidence, 10 July 1997, p. 1043

> would paralyse administrative and judicial machinery, and is abused on something that is unsound psychologically or forensically in terms of the way courts and legislatures function.[139]

4.69 Professor Hafen believed that the Convention could be interpreted to authorise State intervention in respect to the best interests of the child rather than only in cases where there has been shown to be parental abuse or a formal custody dispute.[140] He added that the concept of:

> "Unreasonable" parental conduct is a much lower standard than neglect, abuse, or abandonment - the traditional grounds that trigger state review of parental action ... the CRC could create new intervention standards regardless of its general assurances in Articles 3 and 5 that it "takes into account" the rights of parents.[141]

4.70 Professor Hafen commented that in situations where parents are being unreasonable but not abusive or neglectful, the Convention could be interpreted as permitting external scrutiny and it should be made clear that there is no intention to change the threshold for intervention.[142] Ms Evatt argued that the interpretation of the Convention is to be dealt within our legal system and structures through the application of welfare and family law.[143] Ms Evatt added that the Convention would not change the interpretation of existing legislation because it uses the same language such as best interests of the child, regard for the role of parents and the views of the child.[144] She added that the freedom of religion, expression, privacy are already guaranteed under the *International Covenant of Civil and Political Rights*.[145]

4.71 A number of submissions cited the example of the 'Damien divorce case'. In the 1986 case, a 15 year old in Victoria was allegedly encouraged by welfare workers to divorce his parents.[146] The case cost the taxpayer approximately one million dollars, money which is badly needed in hospitals and other services.[147] The Committee notes, however, that this case occurred in 1986 before the

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139 Hafen, Transcript of Evidence, 9 May 1997, pp. 344-5; see also Hafen and Hafen, *op cit*, p. 462

140 Hafen, Submission No. 666, p. S 3463

141 *ibid*, pp. S 3463-4

142 Hafen, Transcript of Evidence, 17 April 1998, p. 1578

143 Evatt, Transcript of Evidence, 17 April 1998, p. 1578

144 *ibid*, p. 1579

145 Evatt, Transcript of Evidence, 17 April 1998, p. 1579

146 For example, the Australian Family Association (Adelaide), Submission No. 45, p. S 253

147 McCormack, Submission No. 417, p. S 2499

Convention on the Rights of the Child had been fully developed and the case used existing domestic legislation.

4.72 In relation to children 'divorcing' their parents, the comment was made that in New South Wales child welfare law there is an 'irretrievable' breakdown clause which enables the child or the parents to undertake actions but if the child lacks full capacity, a guardian will be appointed by the State.[148] In relation to the link between the Convention and children 'divorcing' their parents, the Children's Interests Bureau Board South Australia told the Committee that:

> ... the phenomenon of children supposingly 'divorcing' their parents arose from a mixture of semantic confusion and media sensationalism. Until the mid 1970s most States in Australia had welfare legislation which referred to 'uncontrollable' or 'uncontrolled' children. This term justifiably fell into disfavour as it seemed to place all the 'blame' for family conflict on to children. Consequently, the concept of irreconcilable differences was borrowed from divorce legislation and was used in those relatively rare cases of family conflict which ended up in court proceedings for one reason or another. The idea of children divorcing their parents seized the public imagination, was popularised by the media and fed the prejudices of those who thought that children had too much freedom and too many 'rights' anyway ... There were some Australian cases throughout the 1980s.[149]

4.73 Call to Australia believed that this Article in effect transfers the responsibility for the child from the parents to the State.[150] Concern was also expressed that Article 12 could mean that parents and educational authorities might give children's views more weight than they might otherwise do.[151]

4.74 There was concern that there could be State intervention to test the reasonableness of parental guidance and that this article has the potential to interfere with parent-child and teacher-child relationships if a child was dissatisfied with parental rulings.[152] If this led to legal proceedings, in some situations the parents may not have the same opportunity to be fairly represented while the child may have access to a government lawyer.[153]

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148 Gurr, Transcript of Evidence, 9 May 1997, p. 358

149 Children's Interests Bureau Board South Australia, Submission No. 327, pp. S 1811-2

150 Call to Australia, Submission No. 179, p. S 1211

151 The Australian Family Association Western Australia Division, Submission No. 39, p. S 218

152 Family Council of Victoria, Submission No. 24, p. S 120; The Australian Family Association, Submission No. 183, p. S 1237

153 King, Submission No. 159, p. S 1078; Endeavour Forum, Victorian Coordinator, Submission No. 15, p. S 59; Call to Australia, Submission No. 179, p. S 1204; Festival of Light, Submission No. 138, p. S 896

4.75 Ozchild made the comment in relation to Article 12 that:

> it also does highlight that tension between what are perceived to be parental rights and what are perceived to be the rights of the child. You could well argue that it is in the best interests of the child to have an adequate sex education. If the parents are unwilling to allow the child to have access to appropriate information, in a sense they are putting the child at some risk.[154]

4.76 Some believed that the phrase 'the evolving capacities of the child' suggested that parental authority would be subject to external scrutiny which would result in new bureaucracies to investigate children's complaints, question parents and arbitrate family disputes.[155] It was argued that it is about power and is, therefore, a potential threat to some of our most precious freedoms, civil liberties and our form of government.[156] It is implicit that the signatories to it will police parents to ensure compliance with the Convention.[157] Children's rights to appeal against parental direction means external scrutiny and is an invasion of parental rights by the State.[158]

4.77 It was argued that States Parties only needed to respect parental rights when the Government considered parents were acting in a manner consistent with the evolving capacities of the child.[159] Festival of Light commented that wise parents will exercise supervision 'in a manner consistent with the child's evolving capacities' but that this will differ between families and between children within a family and the circumstances of the family. However, it was considered objectionable that a government would monitor this, describing the 'Big Brother' approach as characteristic of tyrannical and totalitarian regimes rather than democracies.[160]

4.78 The Family Council of Victoria were concerned about who decides what is appropriate and consistent with the evolving and developing capacity of the child.[161] Mr Khor believed that Article 12 encourages children to stand up to their parents under the guise of freely expressing their view.[162]

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154 Pitman, Transcript of Evidence, 9 July 1997, p. 921

155 The Australian Family Association, Submission No. 183, p. S 1241

156 *ibid*

157 Francis C, *op cit*, p. 6

158 Endeavour Forum, Victorian Coordinator, Submission No. 15, p. S 59

159 The Australian Family Association Western Australia Division, Submission No. 39, p. S 218

160 Festival of Light, Submission No. 138, p. S 905

161 Boyd, Transcript of Evidence, 9 July 1997, p. 902

162 Khor, Submission No. 623, p. S 3168

4.79 The Catholic Women's League (Archdiocese of Canberra and Goulburn) agreed with the concept of Articles 12 and 13:

> ... that children should be heard. However, we believe that strong emphasis must be placed on giving due weight in accordance with the age and maturity of the child. In a family situation or even a school situation, a child's freedom of expression must be limited to that situation and the maturity of the child.[163]

In accordance with age and maturity

4.80 The Youth Advocacy Centre Inc expressed the view that the notion that maturity is a developing capacity is already part of Australian common law and commented that there are still a number of laws which link choices and decisions with particular ages.[164] They suggested that legislation was necessary if children are to enforce their legal rights to make decisions once they are competent to do so.[165] They added that:

> In 1992, in *Marion's Case*[166] the High Court of Australia adopted the English House of Lords decision in *Gillick*[167] into Australian law. It was held that:
>
> > (a) minor is ... capable of giving informed consent when he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.
>
> Statutory recognition of the Gillick decision would ensure that this Article was complied with. At present, young people are subject to a number of laws which arbitrarily give them the ability to make choices and decisions at particular ages. These ages also vary from state to state. [168]

4.81 The *Gillick* case considered the concept of child autonomy and decided that it is the responsibility of parents and society to develop a child to the point where they can make their own decisions.[169] Ms Gurr submitted that the case established that parents' rights diminish over time as the child's understanding and capacity to make decisions grows. She said:

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163 Balnaves, Transcript of Evidence, 29 April 1997, p. 198

164 Youth Advocacy Centre Inc, Supplementary Submission No. 14a, p. S 1034

165 *ibid*

166 *Secretary, Department of Health and Community Services v. JWB* and *SMB* (1992) CLR 218

167 *Gillick v. Norfolk Wisbech Area Health Authority* (1985)3 ALLER 402

168 Youth Advocacy Centre Inc, Supplementary Submission No. 14a, p. S 1034

169 Gurr, Transcript of Evidence, 9 May 1997, p. 357

> That is what every responsible parent would aim at and, hopefully, would carefully watch the capacity, train the capacity and nurture the capacity of the child to become a responsible adult. So that the concept of child autonomy and the way it appears in the convention is, in my view, this movable thing, this spectrum which grows as it diminishes. That is clearly part of Australian law, quite apart from the convention.[170]

4.82 It was argued that the use of 'ages' in legislation is a matter of convenience as it makes life easier for adults, but it is not necessarily fair and reasonable for the young people.[171] Hafen and Hafen commented that the United States legislation uses age-based determinations but acknowledged that this can be imprecise and even unjust in particular cases.[172] They added that individualised determinations may offer greater fairness but this can be offset by the 'inherent lack of reasoned generality and neutrality in subjective decisions'.[173]

> ... judges hardly know the children whose maturity they must judge, or because "maturity" as a concept is hopelessly complex and subjective, or because many choices are (as with abortion) laden with heavy personal value preferences, judicial supervision can abandon children to their immaturity ... Paradoxically, the CRC takes this position on choice rights despite its preference for age-based classifications in dealing with children's violations of penal law.[174]

4.83 It was argued, however, that the use of arbitrary age limits may not take into account the best interests of those children who are articulate and able to participate in choices and decisions.[175]

> Lowering the legal age a child becomes a young adult is not a solution. A legal age has to be an average age. Some children are ready earlier, some later. Lowering the legal age endangers the late maturers. It is wiser to leave the early maturers with the task of learning self-discipline, a great asset.[176]

4.84 It could be also argued that because of the different aspects of a child's maturation, that a different definition 'of child' for different pieces of legislation could be considered as consistent with the Convention as each child is different.

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170 *ibid*

171 Wight, Transcript of Evidence, 1 May 1997, p. 250

172 Hafen and Hafen, *op cit*, p. 464

173 *ibid*, p. 465

174 *ibid*, p. 466

175 Wight, Transcript of Evidence, 1 May 1997, p. 250

176 Evans, Submission No. 388, pp. S 2178-9

The College of Paediatricians commented that it depended entirely on what the child was expressing their view about and what was the purpose.[177]

4.85 In relation to the acceptance of the *Gillick* case, Professor Hafen commented that cases challenging parental rights such as consent to medical treatment, a hysterectomy or blood transfusion are exceptional and he believed that those rules have not been extended to general application to the normal pattern of family life.[178]

4.86 Dr Cronin of the Australian Law Reform Commission believed that courts are increasingly saying that there is a point before 18 that a child's view can differ from a parent and it can affect their substantive rights.[179]

> The view here is that it is good parenting to simply ensure that the voice of the child is heard. If you then decide that in this particular case you do not wish your child, no matter what they say, to have sex education then it proceeds into the Court. But all the Convention is doing is seeking that you do ensure that dialogue is there. That is a view of good parenting.[180]

4.87 Festival of Light believed the Convention turns on its head the traditional understanding of parent-child relations within a common law country such as Australia.[181] They believed that parents have the primary and inalienable responsibility for raising their children and governments are subservient to that primary allegiance within the family in a common law country.[182] It was argued that parent's rights are not inalienable as the parent may not deny a child an education or injure a child and in these instances there may be intervention by the State.[183]

4.88 The National Council of Women of Tasmania (NCWT) commented that they:

> received consistent reports from many delegates of children from good and caring families, "taking the law into their own hands" and testing their "rights" to the limit, without accepting any responsibilities, because of peer support and information and re their "rights" given out at school. NCWT considers

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177 Wigg, Transcript of Evidence, 4 July 1997, p. 706

178 Hafen, Transcript of Evidence, 17 April 1998, pp. 1581, 1583

179 Cronin, Transcript of Evidence, 5 August 1997, p. 1193

180 Kinley, Transcript of Evidence, 5 August 1997, p. 1194

181 Phillips, Transcript of Evidence, 4 July 1997, p. 797

182 *ibid*, p. 798

183 Hall, *House of Representatives Hansard*, 1 September 1993, p. 698

> that it has only been aware of the "tip of the iceberg" and that the reality is of great community concern.[184]

4.89 The Presbyterian Church of Queensland commented that the importance of the family is being reinforced at all levels of government and:

> The need for the strengthening of families and parental responsibility is constantly in the press. The government has recently emphasised the need for families to shoulder traditional responsibilities for children on the dole, for example. If at the same time, the rights of parents are to be eroded within those families, we will see nothing but frustration and resentment.[185]

> The responsibilities parents undertake in the rearing of children must be given due recognition and at times may need to be seen to take precedence over the rights of the child.[186]

4.90 Festival of Light South Australia expressed their concern at the 'ruling' of the United Nations Committee on the Rights of the Child in relation to the Holy See in November 1995 which stated that parents' rights and prerogatives may not undermine the rights of the child, in particular the child's freedom of expression.[187]

4.91 There was also concern expressed that Article 5 is not strong enough and that 'respect' is at the whim of the authorities and this can be abused.[188] Mrs McRae believed that parents have no rights now to discipline their children at a time when governments are trying to make parents responsible for their children's vandalism and parents need to contravene the Convention in order to teach children right from wrong.[189] It was suggested that the Convention disqualifies parents from acting in the child's best interests and is biased against parents and places the family in danger as it undermines parents 'rights and responsibilities'.[190]

4.92 Ms Rayner commented that the concerns are not just in Australia but many parents believed they have a right to bring up their children without any interference by anybody and that interference with that right is a fundamental

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184 National Council of Women of Tasmania, Submission No. 52, pp. S 278-9

185 Presbyterian Church of Queensland , Submission No. 376, p. S 2123

186 Council for Family, Submission No. 185, p. S 1246

187 Phillips, Transcript of Evidence, 4 July 1997, p. 800

188 Smyth, Transcript of Evidence, 4 August 1997, p. 1112; Dimitriou, Transcript of Evidence, 4 August 1997, p. 1112

189 McRae, Submission No. 617, p. S 3147

190 Jak, Submission No. 627, p. S 3178

attack on the human rights of people to form families without any intervention by other people.[191]

> I know from my own experience during the 1980s and 1990s that people are easily frightened into thinking that if you give a child a right you take away a parent's right, that if you say a child should be consulted about a decision it means that the child dictates what the decision is, and that if, for example, you give the child a right of religious belief they will turn into a satanist and lock you out of their room while they sacrifice the family pets.[192]

4.93 Ms Rayner believed that those fears have not been realised since we signed the Convention in 1990 and there has not been a related rise in children doing those things or divorcing their parents.[193]

4.94 Ms Evatt expressed the view that:

> Article 3, 5, 12 and 18 together provide a framework which seeks to balance out in a realistic way the three interests of parents, children and the state. Nowhere is the child given an overriding right. The best interest principle recognises that children to begin with cannot act for themselves but at some point the child must be recognised as being able to make their own determinations.[194]

4.95 National Children's and Youth Law Centre commented that this is a *Convention on the Rights of the Child*, not a convention on the rights of the parent. There are other conventions on the rights of the parents which assume a certain maturity which enables the person to access legal representation, government resources and services and this Convention is an attempt to close that gap and enable children to access these.[195]

4.96 The Human Rights Commissioner commented that:

> There are obligations on governments under these conventions because states are parties. There are not obligations imposed by the Convention on parents ... It does not apply adversely to the relationship between parents and children, but it would seem to me that in the nature of the sentence itself there are no obligations that are placed on parents or on children under the convention itself. It is an obligation placed on governments.[196]

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191 Rayner, Transcript of Evidence, 29 September 1997, p. 1554

192 *ibid*

193 *ibid*

194 Evatt, Supplementary Submission No. 5a, p. S 1564

195 Antrum, Transcript of Evidence, 5 August 1997, pp. 1141-2

196 Sidoti, Transcript of Evidence, 5 August 1997, p. 1190

> **...** If there are conflicts between parents and children, let us look at what is going on in the household rather than blaming it on the Convention on the Rights of the Child, which deals with the responsibilities of government.[197]
>
> ... it provides a basis upon which improper action by governments should be able to be challenged. Often under our law that is not possible, but it should be able to be challenged on the basis that governments are not acting either in the best interests of the child or in ways to support parents in exercising their rights, duties and responsibilities.[198]

4.97 The issue of parents' versus children's rights has hijacked the public debate since ratification and the debate has been mishandled.[199] It was suggested that:

> The view that children's rights undermine parents' rights and, more broadly, that the discourse of children's rights causes family breakdown, need to be countered, as does the view that loving family relationships preclude the need for 'rights'. While one would not argue with the view that loving, stable and respectful family relationships provide the best nurturing environment for children, the reality is that not all children can rely on this alone, for when love, trust and obligation fail, children are left in a perilous position ...Yet, it is true, that it is on the domestic level that confusion around the extent of children's rights occurs and it is wrong to conclude as some parents and others have, that the CROC gives children all the rights that adults exercise. The law itself recognises that children can exercise specific rights at certain ages, eg the right to consent to medical treatment.[200]

4.98 The Youth Affairs Council of South Australia commented that some articles of the Convention have been deliberately misrepresented for partisan political purposes and this has helped generate a climate of hostility towards the Convention which overlooks the basic principle that all actions concerning the child should consider their best interests. [201]

Need for a national education campaign

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197 *ibid*, p. 1191

198 *ibid*, p. 1192

199 Reid, Transcript of Evidence, 6 August 1997, p. 1400

200 Child Health Council of South Australia, Supplementary Submission No. 151a, pp. S 2382-3

201 Youth Affairs Council of South Australia, Submission No. 158, p. S 1074

4.99 The view was put that the notion that we are giving away the rights of parents to discipline their children, or the rights of a family, need to be dispelled through education, which is an issue addressed by the Convention.[202] Dr Funder submitted that information needs to be made available to parents so that they do not presume an intervention between families, parents, responsible adults and children and they realise that the principles support their roles as first-line responsible people for children.[203] This is not reflected well in the media and in debates:

> what is reflected is a notion that talking about children's rights is a zero sum gain. If you talk about children's rights, you are in some way interfering with and diminishing legitimate rights and responsibilities of parents. I think really a fundamental plank in any education campaign has to be to tackle what I see as a false notion of children's rights being a zero sum gain.[204]

> It is of grave concern to the Council that so much deliberate misinformation and many confusing messages have been generated about the Convention, with the aim, it seems, of presenting it as anti-family. This is both regrettable and untrue. Children's rights and family values are not incompatible and the CROC emphasises the fundamental importance of the child enjoying a family environment.[205]

4.100 The NGOs argued that the community often gives priority to the rights and duties of parents, which may in fact be detrimental to the child's right to protection and consideration of the child's views.[206] They believed that a national education campaign should be undertaken to foster an understanding of these issues as the poor understanding of the principle of the child's evolving capacity in the community is also detrimental to the child.[207] The Victorian Council of Civil Liberties expressed the concern that:

> The generalisation, qualification and interpretation associated with the Convention's notion of placing a child's right to self-determination in the context of their evolving capacities, once again leaves the child at the mercy of adult judgement and self interest.[208]

4.101 Ms Evatt was of the view that:

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202 Tucci, Transcript of Evidence, 10 July 1997, p. 1071

203 Funder, Transcript Evidence, 9 July 1997, p. 876

204 *ibid*

205 Child Health Council of South Australia, Supplementary Submission No. 151a, p. S 1006

206 Defence for Children International Australia, *op cit*, p. 17

207 *ibid*, pp. 17-8

208 Victorian Council for Civil Liberties, Submission No. 23, p. S 116

> There is now clear authority that the general line of reasoning of the House of Lords in the *Gillick* case,[209] which acknowledged the correspondence between the diminishing decision making rights of parents and the growing autonomy of children with age, is law in Australia.[210] The growing capacity of the child to make a decision in a particular instance will lead to the eventual extinguishment of the parental right to make that decision for the child. The basis of this reasoning is the principle, well established in law, that parental rights exist in order for the parent to exercise the duty to protect the child. When it is no longer necessary for the parent to carry out that duty, as the child "reaches sufficient understanding and intelligence to be capable of making up his mind on the matter in question"[211] the parental decision making rights in relation to that issue terminate. [212]

4.102 Ms Evatt concluded that Article 5 places the child under the direction and guidance of parents or guardians while the child develops their own capacity to take responsibility in defined areas.[213] Ms Evatt believed that this approach is compatible with the approach of Australian law which also recognises that the child may exercise a degree of responsibility for specific purposes, such as obtaining a drivers licence, before the age of 18.[214]

4.103 A study at the Queensland University of Technology found that children clearly understood that rights and responsibilities are inextricably intertwined.[215] Rights carry responsibilities and an awareness of how behaviour affects others but it is wrong for adults to expect children to make decisions that adults themselves do not wish to make.[216] Human rights are not absolute and must be taken in the context of society and childrens' rights should be seen in the context of the family within which these rights coexist.[217]

4.104 It was argued that the *Family Law Reform Act 1995* which is based on the assumption that parents are best able to look after the interests of their children,

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209 *Gillick v. West Norfolk and Wisbech Area Health Authority and the DHSS* (1986) AC 112; (1985) ALLER 402; 3 WLR 830

210 See *Secretary Department of Health and Community Services v JWB and SMB* (1992) FLC 92-293 at 79,174

211 Lord Scarman in the *Gillick* case at AC 186

212 Evatt, Supplementary Submission No. 5a, pp. S 1559-60

213 *ibid*, p. S 1560

214 *ibid*, p. S 1559

215 Piscitelli, Transcript of Evidence, 1 May 1997, p. 326

216 Child Health Council of South Australia, Supplementary Submission No. 151a, p. S 2383

217 Curran, Transcript of Evidence, 9 July 1997, p. 889

introduces the concept of parental duties and responsibilities and envisages a court determination as being an option of last resort.[218]

> The philosophy guiding the reforms is that children should receive adequate and proper parenting, and that parents have responsibilities for the care, welfare and development of children.[219]

4.105 National Council of Women of Australia commented that in relation to the changes to the *Family Law Act 1975*, there has been a shift from parental rights to parental responsibilities and duties which encourage joint parenting despite the breakdown of the parents relationship.[220]

4.106 The Convention is a buttress to parental rights and responsibilities rather than an attack on them.[221] The *Teoh* case used the Convention to make a powerful Commonwealth Government department re-consider but not reverse, a decision that would have divided a family.[222]

4.107 It was suggested that children are aware of their rights in relation to the police, but not in relation to parents.[223] The Youth Advocacy Centre received about 1000 inquiries per year and none have been from young people wanting to take action against their parents, except perhaps to recover property and it is unlikely that those young people were even aware of the Convention.[224]

4.108 Almost 40 per cent of calls to the Kids Help Line are from children wanting to improve family relationships and they are committed and take a lot of responsibility in trying to make those relationships better.[225]

> The public debate and some of the submissions I have heard today are really demeaning of children. I guess in many ways that sums up where our society is about this convention. There has been an automatic assumption that kids, firstly, do not know enough and, secondly, have to be looked after. I know through our experience at Kids Help Line that kids will try new things, they will learn new skills, they will find different ways of relating to their parents, their care givers, their teachers and other important people in their lives. In

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218 Family Law Council, Submission No. 178, p. S 1188

219 Attorney-General's Department, Submission No. 133, p. S 778

220 National Council of Women of Australia Inc Ltd, Submission No. 451, p. S 2653

221 Bendall, Transcript of Evidence, 9 May 1997, p. 419

222 Fremantle Community Youth Service and Youth Legal Service of Western Australia, Submission No. 177, p. S 1178

223 Wight, Transcript of Evidence, 1 May 1997, p. 256

224 Bartholomew, Transcript of Evidence, 1 May 1997, p. 255

225 Reid, Transcript of Evidence, 6 August 1997, p. 1400

> fact, a proper implementation of the convention would not end up in a bunch of anarchist, anti-parent children in Australia. Children tell us they value their parents and their families above all. We also run a service called Parent Line, for Queensland parents, and they tell us that they value their children and families.[226]

The argument against autonomous rights

4.109 Professor Hafen believed that the concept of the autonomous child was bad social policy because nations should not have domestic laws determined by a non-deliberative international group; it undermines the long-term development of children to leave children alone; it undermines parental commitments to children which suits some parents; it is anti-democratic because it confuses a fear of State paternalism with a fear of parental paternalism.[227] He argued that when you remove parents from that equation then children become the creatures of the State, which really feeds into the basis of totalitarianism, not democracy.[228]

4.110 The Human Rights Commissioner commented that he did not see the Convention as establishing a model of autonomy of individuals but rather as firmly locating the individual within a community, setting out rights and responsibilities and the mutual obligation, that exist between members of communities.[229] He added that the Convention has a strong element on the role of the child and the position of the child within the community and therefore does not set up a model of autonomy.[230]

4.111 He added that treaties are agreements between governments and are about the responsibilities and obligations of governments.[231] The Convention does not deal with the responsibilities or obligations of the child within the family nor the responsibilities or obligations of parents towards their children.[232]

4.112 The Commissioner argued that Article 5 states that governments have a responsibility or an obligation to respect the responsibilities, rights and duties of parents and support them, including in providing guidance to children in the

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226 *ibid*

227 Hafen, Transcript of Evidence, 9 May 1997, pp. 346-7

228 *ibid*, p. 348

229 Sidoti, Transcript of Evidence, 5 August 1997, p. 1185

230 *ibid*

231 *ibid*, pp. 1186-7

232 *ibid*, p. 1185

exercise of all rights contained in the Convention.[233] He added that although the preambular paragraphs 5 and 6 affirm the position of the family, Article 5 is incorporated in the body of the Convention and requires governments to respect the roles of parents.[234]

4.113 The Family Court decision in the case of *B v B* concluded that the best interests of a particular child in particular circumstances is important and not the general notion of 'children's best interests' in making decisions.[235] Ms Gurr believed that the 'best interests of the child' is a decision made by someone else therefore the autonomy is not absolute and there is a range of things that need to be taken into account.[236] That is already part of Australian law so the Convention does not impose something that was not already there.[237]

4.114 The South Australian Child and Youth Health Council commented that that people who are known for their children's rights views, will come down to that balance but there is a concern when adults use notions of autonomy to put decisions on children's shoulders that they are too young to make.[238] Ms Castell-McGregor stated that there is a difference between putting decision making capacity on the shoulders of children and respecting their right to participate in decisions.[239] Parents know that as children mature, you negotiate some limits.[240]

4.115 Ms Evatt commented that common law also recognises the growing autonomy of the child:

> Common law, over the years, has evolved the concept of recognising the independent right of the child to make decisions for itself when it is of sufficiently mature years to do so. It would be impossible for a convention on the rights of the child not to recognise that children under 18, at some stage, must be seen as capable and independent to make their own decisions. The convention does not exactly specify where that happens, and it can be a

233 *ibid*, p. 1186

234 *ibid*

235 *B and B*: *Family Law Reform Act 1995*, The Full Court of the Family Law Court of Australia, Appeal No. NA 35 of 1996, p. 184

236 Gurr, Transcript of Evidence, 9 May 1997, p. 357

237 *ibid*

238 Castell-McGregor, Transcript of Evidence, 4 July 1997, p. 694

239 *ibid*

240 *ibid*

different age for different purposes, or even for the same child if you have to decide if it is sufficiently mature.[241]

4.116 Ms Evatt concluded that:

It is possible to reconcile the inherent difficulty of a child's dependence in delineating a child's rights by distinguishing the various sorts of interests of children which may give rise to rights. These have been characterised in some discussions as 'basic', 'developmental' and 'autonomy' rights.[242] The first is the right to general physical, intellectual and emotional care within the social capability of the immediate care-givers. The second is the right to the development of their capacities to the best advantage, so as to have an equal opportunity with all other children within their own society to realise their life chances. The third is the right to make choices free of adult and institutional authority.

The problem in defining the scope of this last is that it may conflict with the two other interests; choices that may be made by the autonomous child may prevent him or her realising those other interests. For this reason it is possible to see this third interest as subordinate to the other two - demands for its exercise should only be satisfied if the other two interests are not thereby threatened. Most people as adults, it can be argued, would not choose to have been given, as children, the autonomy to make decisions which would have frustrated their basic and developmental interests. The Convention recognises this in the "best interests" principle, as does Australian law and policy. In his arguments in relation to children's autonomy, Professor Hafen appears not to understand the balance which is thus struck by the Convention between children's autonomy rights and their right to fulfilment of their long term developmental needs.[243]

4.117 Professor Hafen expressed the view that:

The CRC seeks to "liberate" children to make their own choices as early as possible, but it offers no guidance on the crucial issues of who gets to decide when a child's fundamental need for protection and development is threatened, and by what criteria the decision-maker must act. Under both traditional and modern family law, these very subjective questions are left to parents, so long as the parents aren't abusive, until the child comes of age ... The CRC simply does not say who gets to decide "best interests" or "evolving capacity" - and that is part of its deliberate strategy to effect unclear and subtle - but profound - changes over time.[244]

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241 Evatt, Transcript of Evidence, 9 May 1997, p. 406

242 For example, Eekelaar J (1986) 'The Emergence of Children's Rights' *6 Oxford Journal of Legal Studies*, p. 170

243 Evatt, Supplementary Submission No. 5a, p. S 1565

244 Hafen, Submission No. 666, p. S 3466

4.118 A number of submissions expressed concern at the transition from 'age-based' criteria to 'capacity-based' criteria.[245] In most cases parents are in the best position to judge the child's evolving capacities.

> We are not thinking here primarily of formal court decisions. The actual ratification of the Convention by Australia, which has been widely publicised by child's rights advocates in Australia, has created a common perception that children enjoy substantial autonomy in the areas covered by Articles 12 through 16. **It is teachers, social workers, youth workers, family planning advocates, abortionists etc** who are making judgements that particular children have a sufficiently evolved capacity to exercise such 'rights' as having an abortion, receiving information on drugs (eg. teaching them how to inject heroin 'safely' rather than not use it at all), etc without parental knowledge let alone supervision.[246]

Child rights - parents' rights dichotomy

4.119 Concerns were expressed that Articles 12 to 17 of the Convention in various combinations confer unrestricted and autonomous rights of freedom without giving parents corresponding rights to authority. This was seen to be the case particularly in relation to receiving information, freedom of religion and freedom of association.[247] It was argued that the whole Convention was biased in favour of children's rights as against the duties and responsibilities of parents in rearing their children in a caring atmosphere.[248]

4.120 It was argued that the Convention is a very serious invasion of parental rights and that many important decisions on the appropriate education, philosophy, morality and religion for all children will finally be vested in the State. While Article 14(2) requires States Parties to respect the rights and duties to provide direction for the child, some did not believe that the Convention gave parents the same level of authority to choose the religious and moral education for their children.[249] The Australian Family Association was also concerned that the vague qualifications make quite inadequate provision

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245 For example, The Australian Family Association Western Australia Division, Submission No. 39, p. S 219

246 The Australian Family Association Western Australia Division, Submission No. 39, p. S 219

247 Craigslea Branch, National Party of Australia, Submission No. 9, p. S 31; National Council of Women of the ACT, Submission No. 35, p. S 194; Morrison, Transcript of Evidence, 29 April 1997, p. 201; Peirson Adolescent Support Service, Submission No. 128, p. S 707; Francis C (1990) 'The Legal Consequences of the UN the United Nations Convention on the Rights of the Child' *The Australian Family* 11(4):23 - 30, p. 25; Zammit, Submission No. 424, p. S 2540; Family Council of Victoria, Submission No. 24, p. S 119; Eastwood, Transcript of Evidence, 3 July 1997, p. 610

248 Cooray L J M, 'Warning on child abuse rights', *The Australian*, 5 December 1990, p. 10

249 Focus on the Family Australia, Submission No. 60, p. S 309; Marshall, Submission No. 367, p. S 2083

for any subjective judgement by parents as to what is in the best interests of the children.[250] It was suggested that the onus should be on the State to prove that the parents have not fulfilled their duty properly and have lost their rights, otherwise parents' rights should prevail and not vice versa.[251]

4.121 Concerns were raised that this enabled government agencies to monitor the relationships between parents and children and gave the child the right to appeal against parental decisions they found irksome.[252] The Family Council of Western Australia commented that:

> The finding by the Full Court of the Family Court that in determining the child's best interests they should have regard to the Convention on the Rights of the Child clearly opens the way for the court to hear cases to enforce children's autonomy 'rights', based on articles 12 through 16 of the Convention, against parents.[253]
>
> These developments show quite clearly that opponents of the Convention have been right all along. It is, as stated by the international Committee on the Rights of the Child, inherently opposed to parental prerogatives that in any way conflict with children's autonomy rights as stated in the Convention. That is to say that it is fundamentally and not incidentally anti-family and anti-parents.[254]

4.122 Mr Crockford stated that the vagueness of these Articles allows social workers and other counsellors to further their own agendas such as increasing government funding by increasing the number of clients.[255] It was argued that Article 5 provided very little protection for parental authority because Articles 12 to 16 appeared after it and overrode it.[256]

4.123 It was suggested that Australia should adopt a Parents' Rights and Responsibilities Act which would create a more equitable means of protecting the welfare of children and families.[257] A parent must be allowed to act in the best interests of an immature child of limited knowledge and exposure to social dangers.[258] The Convention could be used as an excuse by parents who

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250 The Australian Family Association, Submission No. 183, p. S 1240

251 Ginn, Transcript of Evidence, 5 August 1997, p. 1232

252 Festival of Light, Submission No. 138, p. S 897; Family Council of Victoria, Submission No. 24, p. S 119

253 Family Council of Western Australia, Submission No. 442, p. S 2632

254 *ibid*

255 Crockford ,Transcript of Evidence, 4 August 1997, p. 1116

256 Francis C, *op cit*, p. 6; The Australian Family Association, Submission No. 183, p. S 1240

257 Parents Rights and Support Group Inc, Supplementary Submission No. 48a, p. S 2295

258 Child Abuse Prevention Service, Submission No. 26, pp. S 164-5; Francis C, *op cit*, p. 7

exercise too little control over their children.[259] Child and Youth Health South Australia cautioned that the notion of children flexing their muscles must not be confused with children's rights because parents have rights too.[260]

4.124 Concern was expressed that by giving children these rights it removes their right to protection.[261] Professor Hafen believed that the way to free children is with education and parental guidance.[262] Ms Evatt saw no inconsistency in a society in which the State enabled children freedom of expression and a society in which children were given appropriate nurturing and guidance.[263]

4.125 Others argued that these articles were not problematic and that the rights of children and the rights of families can and do co-exist.[264] It was also argued that if you read these articles in the light of the Convention, they take a more cooperative and definitely pro-family position.[265] The Convention upholds the primary role of parents and refers to it repeatedly throughout the document.[266] The Convention reinforces trust and confidence between family members and strikes a balance between the rights of parents and the rights of children.[267] Save the Children Australia argued the Convention is crystal clear that parental care is the best sort of care for children.[268]

> The family plays an important role in the bringing up of children. There is nothing in the convention which contradicts the interests of both the child, as a subject of his or her own rights, and the family, a part of which every child is.[269]

4.126 The inclusion of Articles 13 to 16 was partly due the United States Government's concern that the focus favoured the economic, social and cultural rights to a greater extent than civil and political.[270] Those rights are already

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259 Francis, *op cit*, p. 30

260 Castell-McGregor, Transcript of Evidence, 4 July 1997, p. 695

261 Crockford, Transcript of Evidence, 4 August 1997, p. 1118

262 Hafen, Transcript of Evidence, 17 April 1998, p. 1584

263 Evatt, Transcript of Evidence, 17 April 1998, p. 1584

264 Early Childhood Alliance, Submission No. 166, p. S 1108

265 Krohn, Transcript of Evidence, 9 July 1997, p. 832

266 UNICEF, Submission No. 156, p. S 1048

267 *ibid*; Free Kindergarten Association of Victoria, Submission No. 43, p. S 244

268 Rose, Transcript of Evidence, 10 July 1997, p. 979

269 Kolosov, Transcript of Evidence, 3 September 1997, p. 1527

270 Dolgopol, Submission No. 726, p. S 3606

available under the *International Covenant on Civil and Political Rights*.[271] Ms Evatt concluded that:

> ... it can be seen that the concepts underlying the CRC are already fully recognised in international treaties which apply to children to the extent that, either with parental guidance or in accordance with their evolving capacities, they are able to exercise these rights.[272]

4.127 Ms Dolgopol added that:

> The context in which such rights are enunciated and understood is one where children in countries such as Romania as it then was, were forced to comment on the political activities of their parents, where religious minorities in many countries were not allowed to pass on their religion to their children, where young people in South Africa were shot and killed for protesting against the unequal education they were receiving. In such circumstances it is not difficult to understand why a body charged with elaborating an instrument whose purpose is to promote and protect human rights would perceive civil and political rights as being important.[273]

4.128 Mr Kaye summarised the situation as:

> We would all like our children to grow up in a society which encourages freedom of speech and which encourages children to read and to form their own ideas based upon knowledge that they acquire. Obviously some forms of knowledge and some forms of experience are not desirable. Parents ought to be able to ensure that their children are protected from those things and, where appropriate, the state should intervene to ensure that those sorts of experiences or materials are kept from children because they are not appropriate ... Those who would suggest that the convention is proceeding down that path are taking an interpretation which is not consistent with the overall principles under which the convention proceeds.[274]

4.129 Ms Krohn believed that there must be a balance between the autonomy principle and human dignity and that human rights and responsibilities need to be emphasised more within a communitarian and interdependent interpretation.[275]

4.130 Ms Mason commented that:

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271 Evatt, Transcript of Evidence, 9 May 1997, p. 409

272 Evatt, Supplementary Submission No. 5a, p. S 1564

273 Dolgopol, Submission No. 726, p. S 3608

274 Kaye, Transcript of Evidence, 4 August 1997, p. 1084

275 Krohn, Transcript of Evidence, 9 July 1997, p. 832

> The rights that Australia seems to be experiencing difficulty with are in relation to articles 12 to 16 and are no higher standards than those guaranteed under most constitutions everywhere in the world for citizens of their countries ... most of these civil rights and freedoms are guaranteed to everyone and there is always the proviso that it does not interfere with the rights of other persons in these same capacities - the right to freedom of expression. For an adult, freedom of expression is guaranteed provided it is within the confines of the laws relating to libel and slander, et cetera. So an adult is allowed freedom of expression but is not allowed to slander anyone or libel anyone. The child is allowed to speak, but with those same provisos and also within the parameters that are set by the parents, legal guardians or schools, et cetera.[276]

4.131 Ms Evatt also expressed the view that a child can only exercise its rights to freedom of expression, freedom of thought and conscience and freedom of association as part of the whole community exercising those rights and subject to the guidance of parents.[277]

4.132 Ms Dolgopol also commented that the freedom of religion article related to groups such as the Kurds who were being persecuted and not allowed to teach their religion to their children and the freedom of expression related to groups such as children in South Africa demonstrating against apartheid and these article were never intended to interfere with the day-to-day relationship between parents and children.[278]

Respect for the views of the child

4.133 While no States Parties have placed reservations on Article 12, Kiribati, Poland and Singapore have made specific declarations relating to parental authority for Articles 12 to 16.[279] A number of countries has general reservations which would touch on most articles in the Convention.

4.134 The United Nations Committee on the Rights of the Child (CRC) expressed its concern that Article 12 was not fully implemented in Australia.[280] The CRC suggested an awareness raising campaign to inform parents of the

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276 Mason, Transcript of Evidence, 3 September 1997, p. 1530

277 Evatt, Transcript of Evidence, 17 April 1998, p. 1582

278 Dolgopol, Transcript of Evidence, 17 April 1998, p. 1583

279 The Convention on the Rights of the Child http:/www.un.org/depts/treaty/final/ts2/newfiles/part_boo/iv_boo/iv_11.html

280 United Nations Committee on the Rights of the Child, *Concluding observations Australia* (CRC/C/SR 403-405), 24-25 September 1997, p. 2

importance of children's participation and training for specialists to ensure the child's views are solicited and they are assisted in expressing their views.[281]

4.135 The New South Wales Government believed that there is insufficient attention paid to children's views due to a lack of respect for their views; there are few legislative or administrative requirements to ascertain children's wishes; they are unaware of their rights and how to assert them; there are no clear guidelines for gaining children's views; and almost no opportunity for children to participate in processes that concern them.[282]

4.136 The Children's Commissioner for Queensland also stated that Article 12 was not taken seriously enough as parents and children complain that in Family Law Court matters the child's views are not always given adequate consideration.[283] There were also legislative changes in Queensland in 1996 which excluded the necessity of school principals to hear the student's case prior to a decision to suspend.[284]

4.137 National Legal Aid commented on the merit of interpreting Article 12 in terms of appropriate involvement rather than the notion of just 'being heard'.[285]

> Timely and modest involvement of the child can save all parties and the judicial system generally substantial Legal Aid costs if the representatives involved have the expertise to broker satisfactory arrangements between interested parties.[286]

4.138 The democratic principle that people will stand up for themselves will not work if children and young people are not in a position to do this:

> Children are a large but uniquely uninfluential sector of the population. They are particularly powerless and vulnerable, and are generally highly restricted in both the extent to which they can make decisions about their own lives and the extent to which they can participate in society's overall decision making processes. As children grow older they gradually acquire more control over their lives, but even though 17 year olds have more say over their own lives, they are still excluded from the democratic process.[287]

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281 *ibid*

282 New South Wales Government, Submission No. 652, p. S 3260

283 Alford, Transcript of Evidence, 1 May 1997, p. 227

284 Youth Affairs Network of Queensland, Submission No. 415, p. S 2486

285 National Legal Aid, Submission No. 106, p. S 513

286 *ibid*

287 Victorian Council for Civil Liberties, Submission No. 23, p. S 116

4.139 It was also suggested that children should play a real role in all bodies which have power to effect their lives.[288]

> The policy formulation process is designed in a way that excludes young people and youth service providers from actively participating in the development of policy. All tiers of government lack substantial review mechanisms by which programs can be regularly monitored and evaluated. Essentially there are no formal mechanisms to ensure governments and their respective departments are meeting the needs of young people.[289]

4.140 Defence for Children International suggested that if children are properly prepared and resourced they have the capacity to participate in advisory committees and that it would be unacceptable to deny this right to other sectors of the community.[290] Burnside supported the view that there should be more channels for children to voice their opinions and to be officially consulted.[291]

4.141 Ms Jones told the Committee that Article 12 was not that radical:

> It is curious that article 12 would give rise to such distress. In common law we have the idea of natural justice which now applies to any decisions affecting the rights, interests or legitimate expectation of any person - except a person is usually an adult. In any context we have the idea that the person should get a hearing. It does not mean that they get the outcome that they want.[292]

4.142 The Children's Interests Bureau Board South Australia believed that while the best interests of the child are paramount it does not mean that their rights and what they are saying will overrule parental rights.[293] It is good parenting, however, to allow them to participate in the discussion.[294]

4.143 Ms Mason told the Committee that:

> I compare that with my son, who is 10 years old and has an opinion on everything. It allows me, as a parent, to cope with him, simply because he affords me, firstly, the opportunity of knowing what he is thinking, how he is thinking, what he is learning on the outside, et cetera. It also affords me opportunities in a different facet of my life, say in dealing with children in

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288 Jones and Marks, Submission No. 91, p. S 441

289 Morey, Transcript of Evidence, 9 May 1997, p. 364

290 Defence for Children International , Submission No. 120, p. S 596

291 Burnside, Submission No. 94, pp. S 452-3

292 Jones, Transcript of Evidence, 5 August 1997, p. 1202

293 Redman, Transcript of Evidence, 4 July 1997, p. 730

294 *ibid*, p. 731

> juvenile court - how I would handle them ... Children are the best ones to afford us that opportunity to assist them in whatever we are doing. We just have to be honest in terms of our dealings with children.[295]

4.144 Eekelhar stated that:

> The starting off point, then, of any rights-based approach to social policy is to have regard to claims which people make and to provide opportunities for claims to be made. What these claims actually are is an empirical matter. This is not simply a theoretical point. It involves the process, so easy for politicians, welfare professionals and even academics to forget: *listening to the people*. No social organisation can hope to build on the rights of its members unless there are mechanisms whereby those members may express themselves and wherein those expressions are taken seriously. *Hearing what children* say must therefore lie at the root of any elaboration of children's rights. No society will have begun to perceive its children as rightholders until adults' attitudes and social structures are seriously adjusted towards making it possible for children to express views, and towards addressing them with respect.[296]

4.145 Kids Help Line commented that children have expert knowledge about bullying in schools, abuse in families, not being listened to by child protection agencies and the fact that they do not know about the Convention, legislation and policy should not prevent them from participating in decisions that will impact on their lives.[297]

4.146 The Children's Interests Bureau Board South Australia supported the regular participation of children in appropriate decision making processes in a 'non-tokenistic' manner.[298] They provided the examples of Department of Family and Community Services in South Australia's negotiations with the State branch of the Australian Association of Young People in Care on issues of alternative care and the Children's Interests Bureau Board South Australia which includes representatives under the age of 18.[299]

4.147 The National Children's and Youth Law Centre commented that often:

> The involvement of young people in decision-making is more than a mere window dressing. It delivers real benefits to the organisation concerned in terms of insight, and commitment to outcomes. It provides an opportunity to

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295 Mason, Transcript of Evidence, 3 September 1997, pp. 1528-9

296 Eekelhar J (1992) 'The Importance of Thinking That Children Have Rights', in Alston P, Parker S and Seymour J *Children Rights and the Law*, Clarendon Paperbacks, Oxford, p. 228 cited in Children's Interests Bureau Board South Australia, Submission No. 327, p. S 1805

297 Reid, Transcript of Evidence, 6 August 1997, p. 1409

298 Children's Interests Bureau Board South Australia, Submission No. 327, pp. S 1810-1

299 *ibid*, p. S 1811

> receive feedback before mistakes are made where the consequences may affect large numbers of young people, or result in disaffection. Politically youth participation assures validation, and some credibility ... Children and young people do not want to be afterthoughts, add-on consultation as a simple, but unsubstantial patronising gesture ... 'youth seminars' being run in tandem with the main program, or a small meeting of articulate private school prefects at the end of the main program. This is youth participation but it is meaningless participation.[300]

4.148 The Alice Springs Youth Affairs Coordination Committee believed that too often disadvantaged children are not present on youth committees such as the recent Northern Territory 'round table'.[301]

4.149 The NGOs expressed concern at the lack of a national mechanism to listen to children, such as the adequacy of mechanisms for enabling children to be heard or represented in the Family Court and in other court proceedings.[302] The NGOs proposed independent advocates for children in care or needing care or on whose behalf critical decisions are being made, to ensure that their views are heard.[303] They would like to see the right to be heard incorporated into law and guidelines developed in relation to courts and tribunals.[304]

4.150 Lutheran Community Care supported children's rights to be heard in all areas of the legal process but emphasised that they also need an explanation of the outcomes of the process.[305] Action for Children expressed the view that a child's right to be heard is not the same as receiving a judicial determination in their favour.[306] Children need to know what is happening, be asked their opinion and have an explanation offered if the outcome differs from their opinion. [307] Many children in the care system talk about their confusion concerning their involvement with the legal system.[308]

4.151 The National Children's and Youth Law Centre believed that:

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300 National Children's and Youth Law Centre, Submission No. 321, pp. S 1780-1

301 Alice Springs Youth Affairs Coordination Committee, Submission No. 182, p. S 1226

302 Defence for Children International Australia, *op cit*, p. 17

303 *ibid*

304 *ibid*

305 Lutheran Community Care, *Response to the Australian Law Reform Commission Re: Children and the Legal Process*, p. 2

306 Dolgopol, Transcript of Evidence, 4 July 1997, p. 676

307 Lutheran Community Care, *op cit*, p. 3

308 *ibid*

> Children and young people should be listened to in the home, at school, at the local council, at the departmental office, at the detention centre, at the government offices, at the community organisation and in the court. This does not mean that adults forfeit the sole power of decision-making to children - it means that children and young people are involved in the decisions, and that their views are given due and courteous consideration as any other contributor to the process would expect.[309]

4.152 There is a greater community awareness of the need for children to participate rather than a sudden desire to implement the Convention. Decency decisions are justified on the basis of that Convention.[310] National Legal Aid commented that in the last five years children have been more likely to be heard, involved and able to give evidence in a respectful way.[311] For example, a number of police forces around the country now have specialist children's abuse units and their processes are much improved.[312]

4.153 Youth Affairs Council of South Australia (YACSA) believed that the Convention has played an integral role in raising community consciousness in relation to children's participation in decision making processes and has sent a strong message to the community that children and their views do matter.[313]

> YACSA has been enriched by the South Australian government's youth participation pilot program, which is aimed at giving young people the opportunity to participate in decision making in the operation of various boards and bodies. This initiative gives effect to the convention's participation provisions and has been extremely successful. The fresh insight and unique perspective offered by children in all matters, but particularly with regard to decision making that directly affects their lives, must be harnessed. Involved, informed, participating children will in time become responsible, participating adults. If policy is to be framed in the best interests of children, surely decision makers need to be aware of the opinions of those whom the policy concerns. As such, children must be given avenues through which to participate in decision making processes.[314]

4.154 Children will often not seek help because they do not believe that there is adequate consultation by the organisations and services that are available to them.[315] Kids Help Line commented that it is often considered to be too hard to

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309 National Children's and Youth Law Centre, Submission No. 321, p. S 1781

310 Staniforth, Transcript of Evidence, 29 April 1997, p. 143

311 *ibid*, p. 141

312 *ibid*

313 Handshin, Transcript of Evidence, 4 July 1997, p. 710

314 *ibid*

315 Reid, Transcript of Evidence, 6 August 1997, p. 1401

consult or include participation but that children are often keen to have their views heard.[316]

Children aren't happy being home alone

Sarah Guttie, 6 years, The Murri School, Brisbane

> Consulting with kids is not a parent-bashing exercise. For example, when we asked kids about how they felt about being home alone, it was merely to see how they felt and to find out what was happening. We discovered that 75 per cent of kids did not know what to do in the case of an emergency, and so we were able to go through the media to call on parents to sit down and go through basic safety strategies with their kids. We called on workplaces to open up the telephone lines so that parents could phone home or kids could phone, just to check that they were safe. We called on parents to natter with their neighbours as follow-up if anything did happen. When you do consult like that, the outcomes are good for everyone.[317]

Freedom of expression

4.155 Article 13 has identical wording to Article 19 of the *International Covenant on Civil and Political Rights* and has the same connotation as the implied freedom of expression in the Australian Constitution.[318] Austria, Holy See and Malaysia have placed reservations on this Article and Algeria,

316 *ibid*, p. 1417

317 *ibid*, p. 1418

318 Dolgopol, Submission No. 726, p. S 3611

Belgium, Kiribati, Poland and Singapore have made declarations.[319] The major concerns were the compatibility with the European *Convention on the Protection of Human Rights and Fundamental Freedoms*, the rights of parents, compatibility with constitutions and penal codes.[320] A number of countries have general reservation or declarations which may touch on this article.

4.156 The Catholic Women's League (Archdiocese of Canberra and Goulburn) believed that Article 13 is admirable as long as it only means that a child should be able to be fully educated and to explore ideas to achieve their potential.[321]

4.157 Professor Kolosov expressed the view that freedom of expression has limitations, such as the rights and reputations of others and for national security or public order. Freedom of expression also entails a responsibility and is in the interest of the community or the nation. A child must be taught to express their opinion gradually, in accordance with their maturity.[322]

4.158 Mr Antrum commented that this is not a 'free for all' but parents have the obligation to assess their child's developing maturity and exercise their discretion.[323] Ms Evatt believed that:

> Article 13 of the CRC is almost identical with 19(2) and (3) of the ICCPR but omits 19(1) which covers the right to hold opinions. This reflects the fact that a child is under tutelage. It also omits the reference to special duties and responsibilities. That part of the ICCPR is though[t] by some to be directed to the possible abuse of the right which may result from a concentration of media power, rather than to the listed restrictions.[324]

4.159 The Youth Legal Service of Western Australia believed that although Article 13 does not specifically refer to parents there are very strong statements about the role of the parents in the Convention.[325]

> ... if you looked at the history of South Africa, for instance, and the role that children and young people played there in the movement towards getting rid of apartheid, that was a crucial role and you certainly would not want to stop young people from having rights of freedom of association and freedom of

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319 The Convention on the Rights of the Child http:/www.un.org/depts/treaty/final/ts2/newfiles/part_boo/iv_boo/iv_11.html

320 *ibid*

321 Balnaves, Transcript of Evidence, 29 April 1997, p. 199

322 Kolosov, Transcript of Evidence, 3 September 1997, p. 1530

323 Antrum, Transcript of Evidence, 5 August 1997, p. 1143

324 Evatt, Supplementary Submission No. 5a, p. S 1562

325 McDougall, Transcript of Evidence, 3 July 1997, p. 564

> speech. That is the sort of example of the way you do not want a government to be able to stop and interfere with those sorts of rights.[326]
>
> If you look at the International Covenant on Civil and Political Rights, no Australian government has ever used that covenant to try to tell parents they may not regulate their child's conduct in terms of hours when they have to be in and in terms of reading material in the home. If an Australian government had wanted to do that, they already had the power under the International Covenant on Civil and Political Rights to do that.[327]

4.160 Ms Coady argued that although Article 13 gives the child freedom of expression does not mean that the child's views will go unchallenged and that the trend to listen to children more often has led to a greater awareness of problems such as sexual abuse.[328]

Freedom of thought, conscience and religion

4.161 Article 14 requires States Parties to respect the child's right to freedom of thought, conscience and religion and to respect the rights and duties of the parents and carers to provide direction to the child in the exercise of his or her rights, in a manner consistent with the evolving capacities of the child.

4.162 Thirteen countries have made reservations and six have made declarations.[329] The major concerns were incompatibility with the rights of parents, constitutions, customs and traditions and the provisions of the Islamic Shariah, the *International Covenant on Civil and Political Rights* and the European *Convention for the Protection of Human Rights and Fundamental Freedoms*.[330] A number of countries have raised general reservations and declarations which may affect the implementation of this article.

4.163 Article 13(3) of the *International Covenant on Economic, Social and Cultural Rights 1966* gives parents the right to choose freely an education for their children. Article 16(3) of the Universal Declaration of Human Rights states *inter alia* that the family is the natural and fundamental unit of society and is entitled to protection by society and the State; Article 26(3) of the same convention states that parents have a prior right to choose the kind of education

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326 Dolgopol, Transcript of Evidence, 4 July 1997, p. 664

327 *ibid*

328 Coady, Submission No. 708, p. S 3561

329 The Convention on the Rights of the Child http:/www.un.org/depts/treaty/final/ts2/newfiles/part_boo/iv_boo/iv_11.html

330 *ibid*

that shall be given to their children; and in the International *Covenant on Civil and Political Rights 1966*, elaborating on some of the rights listed in the universal declaration, Article 18(4) compels States to have respect parents' rights to ensure the religious and moral education of their children in conformity with their own convictions.

4.164 Mr McCorquodale emphasised that Article 14 also refers to parents interests.[331] Ms Evatt stated that:

> Article 14 is similar to ICCPR 18 but omits for the child the freedom from coercion to adopt a religion. It also speaks in terms of "respect" for the rights of the child and for the rights and duties of the parents. Both acknowledge the rights and duties of parents to give direction to the child. Article 14, in saying that this direction shall be "consistent with the evolving capacities of the child," resolves potential conflict under the ICCPR between 18(1), which gives the basic right to freedom of thought, conscience and religion and 18(4), which enjoins States Parties to respect the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions, in a reasonable manner. Although ICCPR 18 (4) has not been the subject of a decided case, as a general proposition, the term "child" is likely to be interpreted in the light of the evolving capacities of the child.[332]

Children have a right to religious freedom

Drawing by Letisha Green, aged 7 years, The Murri School, Brisbane

331 McCorquodale, Transcript of Evidence, 29 April 1997, p. 173

332 Evatt, Supplementary Submission No. 5a, pp. S 1562-3; See also Manfred Nowak, (1993) *UN Covenant on Civil and Political Rights, CCPR Commentary*, Engel, p. 331

4.165 Festival of Light believed that this places a restriction on the freedom of parents to ensure the religious and moral education of their children and opens the door to religious persecution by the state.[333] Child Health Council of South Australia referred to the 'Children of God' case where authorities were criticised for the intervention of the families who belonged to the sect. [334]

4.166 Lutheran Community Care commented that cults and religions on the fringe of mainstream society are becoming more accepted in our more tolerant society.[335] Concerns were raised that there was no parental right over the child's religion and the example was given of young adolescents being interested in satanic cults or fringe religious sects.[336] It was suggested that as children become increasingly aware of the contents of Article 14 it will become increasingly difficult for parents to encourage their children to adhere to the traditional religious practices of the family.[337]

4.167 In the case *of Yoder v Wisconsin*,[338] the United States Supreme Court held that the Amish did not have to comply with a requirement that a child attend school and the parents' right to direct the child in conformity with their religious beliefs was put above the child's right to education.[339] The dissenting judge concluded that the child should have been consulted before they were prevented from completing their secondary education.[340]

4.168 However, Ms Evatt commented that the example provided by Professor Hafen reflected more the difference in public policy between Australia and the United States than a problem with the Convention itself.[341] Ms Coady also argued that many Australians would support the view that the children in that case should have been consulted before being required to complete their secondary schooling in a system limited to that acceptable to the Amish community.[342] Ms Evatt argued that in Australia this would not be seen as an

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333 Festival of Light, Submission No. 138, p. S 903

334 Child Health Council of South Australia, Submission No. 151a, p. S 2383

335 Lutheran Community Care, Submission No. 61, p. S 313

336 Francis C, *op cit*, p. 4; Eastwood, Transcript of Evidence, 3 July 1997, p. 611; Call to Australia, Submission No. 179, p. S 1205; King, Submission No. 159, p. S 1078; Khor, Submission No. 623, p. S 3168; Endeavour Forum, Victorian Coordinator, Submission No. 15, p. S 60; The Australian Family Association, Submission No. 183, p. S 1239

337 Francis C, *op cit*, p. 4; Call to Australia, Submission No. 179, p. S 1205

338 *Yoder v Wisconsin* 406 US. 205, 233 (1972)

339 Evatt, Supplementary Submission No. 5a, pp. S 1564-5

340 Coady, Submission No. 708, p. S 3560

341 Evatt, Supplementary Submission No. 5a, p. S 1564

342 Coady, Submission No. 708, p. S 3560

either/or situation and is settled in a different way in conformity with our Constitution.[343] There are already some avenues available in Australian law for older children who do not want to participate in their parents religion.[344]

4.169 On the issue of freedom of religion the Executive Council of Australian Jewry told the Committee that public occasions previously attempted a 'whole of Australia' approach. More recently there has been a return to a situation where Jewish children seeing public services would feel that they are not really part of Australia.[345] Some minority religious groups such as Muslims whose needs differ from the Christian faiths, are not always accommodated.[346]

4.170 Examples were given of the Unknown Soldier being buried as a Christian although he may not have been Christian.[347] The ceremony after the Thredbo tragedy was also based on the assumption that all those killed were Christians so there are still problems from a multicultural perspective.[348] However, although there were problems in some schools which are predominantly Christian, other schools with a multicultural population were considered to be doing very well.[349]

> The awareness of professionals who work with minority children of these factors are important and there is a need for cross cultural training for all professionals such as pre-school, primary and high schools, health professionals, welfare and other people who are involved with ethnic minority children.[350]

4.171 The leaders of many of Australia's religious groups, at the recent Religion and Cultural Diversity Conference in Melbourne, discussed the prospect of working towards a society:

> ... which was aware there were many ways of being a believing person and being a good person and being a moral person, and looking to take some sort of leadership in bringing Australians together, finding what unites us rather than what divides us. If we put that into the school system, there is plenty that unites everybody, or plenty I think which would be generally unobjectionable,

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343 Evatt, Supplementary Submission No. 5a, p. S 1565

344 Dolgopol, Transcript of Evidence, 4 July 1997, p. 677; see also discussion in Gamble H (1986) *Law for Parents and Children*, Law Book Co, Sydney

345 Jones, Transcript of Evidence, 5 August 1997, p. 1222

346 Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, p. S 677

347 Jones, Transcript of Evidence, 5 August 1997, p. 1222

348 *ibid*, p. 1223

349 Allen, Transcript of Evidence, 5 August 1997, p. 1243

350 Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, p. S 678

> which is subsumed by the practice of - if it makes sense - non-denominational Christianity, just because people have not been thinking about what impact that might have on somebody who is not a Christian.[351]

Freedom of association and of peaceful assembly

4.172 In addition to those countries with general reservations, some countries have placed specific reservations and declarations on this article in relation to its incompatibility with the European *Convention on the Protection of Human Rights and Fundamental Freedoms*, rights of parents and existing legislation.[352] However, Ms Evatt argued that Article 15 is the same as ICCPR Articles 21 and 22 and does not provide any additional rights.[353]

4.173 Prior to ratification, the then Opposition commented that this Article did not acknowledge the right and duty of parents to supervise the associations that their children keep.[354] It was argued that Article 15 made it difficult for parents to prevent their children from associating with people that their parents consider are a bad influence and may encourage children to resist parental guidance and direction.[355] Although Lutheran Community Care supported the children's freedom of association they also believed that parents have a responsibility to use their influence in light of their greater experience and wisdom.[356]

Police powers in public spaces

4.174 The United Nations Committee on the Rights of the Child saw the capacity of local police to remove young people who congregate as an infringement on children's civil rights.[357] In a number of Australian jurisdictions, police have powers to remove children from public places, in

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351 Jones, Transcript of Evidence, 5 August 1997, p. 1225

352 The Convention on the Rights of the Child http:/www.un.org/depts/treaty/final/ts2/newfiles/part_boo/iv_boo/iv_11.html

353 Evatt, Supplementary Submission No. 5a, p. S 1563

354 Hill R, Adjournment United Nations Convention on the Rights of the Child, *Senate Hansard*, 7 November 1990, p. 3675

355 Senator Harradine, Estimates Committee *Hansard*, Committee E, 13 September 1990, p. 98; Francis C, *op cit*, p. 4; Eastwood, Transcript of Evidence, 3 July 1997, p. 611; Endeavour Forum, Victorian Coordinator, Submission No. 15, p. S 60

356 Lutheran Community Care, Submission No. 61, p. S 313

357 United Nations Committee on the Rights of the Child, *Concluding observations Australia* (CRC/C/SR 403-405), 24-25 September 1997, p. 3

circumstances where they have not acted illegally.[358] It was argued that the police practice of moving young people on contravenes several articles of the Convention particularly the rights to freedom of association and to freedom of peaceful assembly.[359] However, the Committee notes that a balance must be met for all users of the community.

4.175 In New South Wales the *Children (Protection and Parental Responsibility) Act 1997* encourages councils to adopt local crime prevention plans after community consultation.[360] While in some jurisdictions councils are working with the police to develop best practice models there are still a number of concerns.

4.176 Young people congregate in public spaces as part of their social development often due to limited alternatives.[361] In Western Australia young people are often excluded from public resources including public space on commercial and 'moral' grounds.[362] It was suggested that there is an element of convenience, arbitrariness and the exercise of authority for its own sake, over a group lacking appropriate or sufficient status and the misuse of the Western Australian *Child Welfare Act 1947* to impose curfews placed serious restrictions on young people's rights.[363]

4.177 It was difficult for police to find somewhere safe to take homeless children at night if going home was not in their best interests.[364] Police are the only agency with a visible presence at that time and the only people who are prepared to act.[365] Young people did not see the police as looking out for their welfare and this may better be performed by outreach workers.[366] Further, Aboriginal children may be in the presence of an elder cousin, a practice condoned by the parents.[367] It was suggested that over policing may criminalise

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358 Western Australia *Child Welfare Act 1947* s138b (1); National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 56; Youth Advocacy Centre Inc, Supplementary Submission No. 14a, p. S 1035; Youth Affairs Network of Queensland, Submission No. 415, p. S 2486; Howard, Transcript of Evidence, 5 August 1997, p. 1255

359 Streetz Research Project Advisory Committee, Submission No. 170, p. S 1133

360 *Children (Protection and Parental Responsibility) Act 1997 Clause 19 (3)*

361 Defence for Children International Australia, *op cit*, p. 16

362 Fremantle Community Youth Service/ Youth Legal Service of Western Australia, Submission No. 177, p. S 1181

363 *ibid*

364 Boyd, Transcript of Evidence, 3 July 1997, p. 567

365 McDougall, Transcript of Evidence, 3 July 1997, p. 568

366 Boyd, Transcript of Evidence, 3 July 1997, p. 561

367 *ibid*, p. 562

rather than rehabilitate and reintegrate young people.[368] Particular groups appear to be targeted, such as homeless people, NESB, Asian, Indigenous and Pacific Islander young people and those adopting a certain style of dress.[369]

> Legal but intrusive practices, together with illegal practices such as verbal abuse, racist abuse, physical assault and sexual assault make public space something of a 'battle ground' for young people, rather than an environment that they can enjoy in the same way as other members of the public.[370]

4.178 The First National Summit on Police and Ethnic Youth Relations made ten recommendations relating to the development of a national integrated strategy on police and ethnic youth relations; an audit of best practice strategies and initiatives; development of an anti-racism policy and improved data collection; a joint project with the media to foster a better image of youth and police relations; provision of information to youths on legal rights; and an independent complaints mechanism.[371]

4.179 It was argued that the police believed they are responding to a community concern but this may be inappropriate in many circumstances.[372] The police take the view that they are prioritising the rights of 'legitimate users' of public space over those of young people.[373] It was suggested that agreed national standards be developed so that young people can attain an equivalent level of social interaction on the streets or in public spaces as that enjoyed by adults.[374]

4.180 The National Children's and Youth Law Centre raised the concern that in practice, many children are not made sufficiently aware of their rights before and during questioning.[375] It was argued that there were many examples of young people alleging threatening behaviour or assault by police while being arrested or in police custody[376] but many felt their complaints would not result

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368 Fitzgerald, Submission No. 562, p. S 2983

369 *ibid*, p. S 2983; Streetz Research Project Advisory Committee, Submission No. 170, p. S 1135; Defence for Children International Australia, *op cit*, p. 15

370 Streetz Research Project Advisory Committee, Submission No. 170, p. S 1137

371 *Summit Report, The First National Summit on Police and Ethnic Youth Relations,* A Joint Initiative of the National Police Ethnic Advisory Bureau and the Youth Sector conducted under the auspices of the Conference of Commissioners of Police, Australasia and the South West Pacific Region, July 7-9 1995, International House, The University of Melbourne, Victoria, Australia

372 Boyd, Transcript of Evidence, 3 July 1997, p. 568; McDougall, Transcript of Evidence, 3 July 1997, p. 568

373 Whittington, Transcript of Evidence, 5 August 1997, p. 1257

374 Fremantle Community Youth Service/ Youth Legal Service of Western Australia, Submission No. 177, p. S 1183

375 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 57

376 Australia Law Reform Commission and Human Rights and Equal Opportunity Commission Draft Recommendations Paper, *A Matter of Priority Children and the Legal Process*, May 1997, p. 89

in positive outcomes and that they may attract adverse police attention in the future.[377]

Protection of privacy

4.181 A number of countries have placed reservations and made declarations in relation to the protection of parental authority, the conformity with the constitution, penal codes and legislation.[378] Ms Evatt was of the view that Article 16 reflects ICCPR 17 without giving additional rights to children.[379]

> Mechanisms for ensuring the privacy of children differ from state to state, but there is no real protection of the privacy of children, or indeed, of adults, in Australia ... Examples of breach of privacy are all too prolific, appearing in the courts, government departments, care and correctional institutions, etc. Information held by government is protected to some extent, at least formally, but that held by private organisations is not protected by legislation at all, despite the pre-1996 federal election promise that privacy legislation would be forthcoming.[380]

4.182 The John Plunkett Centre for Ethics in Health Care expressed the concern that:

> In the vagueness of the language employed here, the framers of the Convention made no distinction between a proper recognition of a child's need for protection from an interfering state authority (in particular, a totalitarian state) and the altogether different, and deeply debatable, notion of a child having privacy interests against its parents. Here the Convention is either confused or morally contentious. Either way, it deserves our most careful scrutiny and not our simple acceptance just because it is part of an International Convention.[381]

4.183 Concern was expressed that the inclusion of the word 'arbitrary' may exclude parents from anything the child considers private such as medical treatments or the child's room.[382] Ms Evatt commented that a child could not take their parent to court for an invasion of privacy unless there was enabling

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377 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 57

378 The Convention on the Rights of the Child http:/www.un.org/depts/treaty/final/ts2/newfiles/part_boo/iv_boo/iv_11.html

379 Evatt, Supplementary Submission No. 5a, pp. S 1563-4

380 Community Services Australia, Supplementary Submission No. 154a, pp. S 2388-9

381 John Plunkett Centre for Ethics in Health Care, Submission No. 160, p. S 1085

382 Call to Australia, Submission No. 179, p. S 1205; Festival of Light, Submission No. 138, p. S 897

legislation.[383] She added that the parent would need to act in an abusive manner before the state would be expected to intervene.[384]

4.184 Hafen and Hafen also stated that the United States' Supreme Court has only upheld privacy rights in relation to abortion and contraception.[385] They argued that the Court recognises parental authority in almost all environments and that abortion is significantly different from other decisions that children may need to make.[386] Professor Hafen argued that there are exceptional cases such as *Gillick* where minors have been given 'choice rights' but that these are rare cases and that the United States' Supreme Court:

> has refused to extend the rationale for these cases into a general rule; hence, the Court has not granted choice rights or individualised determinations of maturity in other cases. It would turn a narrow exception into a general rule to assume ... these cases create broad new rules that alter longstanding patterns.[387]

4.185 The Committee was also given a number of examples where the right to privacy had prevented parents from establishing the whereabouts of their children and the children had died or ended up in gaol.[388] Reverend Nile reported that he had received many complaints about cases where young girls living on the street were involved in prostitution and the parents were not told where the child was.[389] The ACT Grandparents Support Group added that although a degree of privacy is necessary for the child, dead children have no use for privacy.[390]

4.186 Many people have access to information about young people which may be of a highly personal nature.[391] The Human Rights Commissioner also referred to circumstances of sexual abuse of a child, where it may be necessary to withhold information from parents.[392]

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383 Evatt, Transcript of Evidence, 17 April 1998, p. 1581

384 *ibid*

385 Hafen and Hafen, *op cit*, p. 473

386 *ibid*

387 Hafen, Submission No. 666, p. S 3465

388 Moran, Submission No. 397, p. S 2222

389 Nile, Transcript of Evidence, 5 August 1997, p. 1216

390 ACT Grandparents Support Group, Submission No. 127, p. S 700

391 Lutheran Community Care, Submission No. 61, p. S 314

392 Sidoti, Transcript of Evidence, 5 August 1997, p. 1186

> ... people working with young people are breaching confidentiality when talking with parents, other workers and so on, without the young person's consent and possibly in breach of article 3.[393]

4.187 Dr Cronin added that the fact that refusing to provide information about children's well being is being misused by some people does not mean that the problem lies with the Convention.[394] It may mean that we need more education about it.[395]

Publication of names by media

4.188 The Child Abuse Prevention Service believed that all jurisdictions should take effective action to prevent making public the name(s) of individuals or other information which link a child with some socially censurable fact or presumption of same, including newspapers and other media channels which use the mantle of the 'public's right to know'.[396] It could be argued that there needs to be a balance between the public interest in freedom of expression and the protection of privacy.

4.189 In some jurisdictions children's right to privacy is not automatic. For example in Western Australia, children appearing before the Children's Court cannot be identified, but if they elect to appear in the Supreme or District Court they must satisfy the Court that there should be no publication.[397] Concern was expressed that when there is legal protection that breaches of the law brings no response.[398]

Medical treatment

4.190 A number of submissions raised the issue of young people consenting to medical treatment:

> In **Marion's Case ((1992) 175 CLR 300)** the **Gillick** decision was adopted as part of Australian law. In that case a majority of the High Court stated that a minor is ... capable of giving informed consent when he or she achieves a

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393 Youth Advocacy Centre Inc, Supplementary Submission No. 14a, p. S 1035

394 Cronin, Transcript of Evidence, 5 August 1997, p. 1184

395 Sidoti, Transcript of Evidence, 5 August 1997, p. 1186

396 Child Abuse Prevention Service, Submission No. 26, p. S 165

397 Legal Aid Western Australia, Submission No. 141, p. S 927

398 Youth Advocacy Centre Inc, Supplementary Submission No. 14a, p. S 1035

> sufficient understanding and intelligence to enable him or her to understand fully what is proposed.'
>
> YAC endorses the statement made by Lord Scarman in **Gillick's Case**, viz, 'If the law should impose upon the process of 'growing up' fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and change.'
>
> The law requires that medical practitioners obtain informed consent to medical treatment. The law further states that children can be capable of giving such informed consent. It therefore follows that similar criteria apply in relation to children within the legal system.[399]

4.191 Lord Scarman stated that:

> The common law has never treated [parental] rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. Parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child ...[400]

4.192 It was argued that the *Gillick* and *Marion* cases have greatly redefined the limits of parental powers and recognised the power of children to give consent.[401]

> ... it is part of the everyday experience of doctors to make judgements about their patient's capacity. Doctors are required to explain adequately to any patient the nature of proposed treatment and must be satisfied that the patient understands it. Under **Gillick and Marion's case** the practitioner's responsibility is to inform the child, in language which the child can understand, of the nature of the proposed treatment and its short and longer term medical implications including any risks. If the child demonstrates a capacity to understand the explanation and shows an appreciation of the benefits and risks the doctor can make a judgement as to the child's competence.[402]

4.193 Nationally there are a number of laws allowing consent by minors to medical treatment, including the New South Wales *Minors (Property and Contracts) Act 1970*, the *Children (Care and Protection) Act 1987* and the

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399 Youth Advocacy Centre Inc, Submission to ALRC and HREOC. *Speaking for Ourselves, Children and the legal process. Issues Paper 18,* July 1996, p. 4

400 Children's Interests Bureau Board South Australia, Submission No. 327, p. S 1810

401 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 44

402 *My Body, My Decision: Children's Consent to Medical Treatment.* Discussion Paper, National Children's and Youth Law Centre, May 1995, p. 14

Mental Health Act 1990, the *Child and Young Persons Act 1996* in Victoria, and the Northern Territory's *Emergency Medical Operations Act 1992* and the *Consent to Medical Treatment and Palliative Care Act 1995*.[403] The ACT is currently reviewing its legislation in relation to consent to medical treatment.[404] It was suggested that the Federal Government develop model legislation incorporating the *Gillick* principle and listing the matters that must be taken into account in determining if an individual child has the capacity to consent or to refuse medical treatment.[405]

4.194 Professor Hafen gave the example of a study in America that found that of the 1500 young women applying for abortions were deemed to be mature enough because judges were simply not willing to make the decision for them.[406] Ms Coady commented, however, that these decisions were understandable given the 'immense consequences' for the 16 and 17 year olds who wanted to have abortions if this was not permitted and argued therefore that is not 'a decisive piece of evidence' that judges were unwilling to make decisions in relation to the competence of children in other matters such as child abuse.[407]

4.195 A number of parents expressed their concern about this aspect of the Convention, particularly in relation to matters such as young girls being given the pill without parental consent.[408] Some submissions expressed the concern that privacy covers rights that many parents would object to, including sexual activity, abortion and contraception.[409] Dr Sawyer commented that in one hospital in Melbourne probably half of the pregnancy terminations performed on 14 to 15 year olds are performed without parental consent.[410]

4.196 It was submitted that a number of young people who have committed suicide had visited their medical practitioner prior to the attempt. It was argued therefore, that this is an important opportunity for intervention at which the offer of confidentiality may increase the trust and respect and:

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403 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, pp. 46-50; Sawyer, Transcript of Evidence, 9 July 1997, p. 855

404 ACT Government, Submission No. 189, p. S 1305

405 National Children's and Youth Law Centre, Submission No. 321, Annexure 2, p. 51

406 Hafen, Transcript of Evidence, 17 April 1998, p. 1586

407 Coady, Submission No. 708, p. S 3563

408 For example, The Australian Family Association, Submission No. 183, p. S 1240; Francis C, *op cit*, p. 4

409 The Australian Family Association Western Australia Division, Submission No. 39, p. S 219

410 Sawyer, Transcript of Evidence, 9 July 1997, p. 857

> ... it increases their willingness to disclose personal concerns and worries such as depression or risk of suicide. The right to confidential health care is obviously a very first step to trying to improve health outcomes for young people.[411]

4.197 The comment was also made that:

> Clearly, in terms of all confidentiality statements to young people, there are exclusions to that which in terms of threats of homicides, suicide or self harm. Those exclusions hold for anyone[412]

4.198 Youth Affairs Network of Queensland suggested that young peoples' well being may be at risk if they avoid seeing a health professional for fear of their parents finding out.[413]

4.199 There are inconsistencies between States in relation to confidentiality and age basis at which consent is required.[414] It was argued that currently there are also inconsistencies within States such as the *Child and Young Persons Act 1996* in Victoria which gives mature 16-year-olds the capacity to consent to medical treatment but not to refuse medical treatment.[415] However, it could also be argued that there is a material difference between giving consent and refusing medical treatment.

4.200 The Centre for Adolescent Health believed that the record of a mature minor should only be available to a third party with the child's consent.[416] However, even if a child were to be given assurances of confidentiality under State legislation, the parents could obtain the information in certain circumstances under the Commonwealth *Freedom of Information Act 1982*.[417] The comment was made that:

> While particular institutional based procedures aim to ensure that confidential information is not given to parents through the Freedom of Information Act (by deleting the sensitive part of the medical record for example), the failure of this mechanism to proven highly sensitive and confidential information being released is well known.[418]

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411 *ibid*, p. 854

412 *ibid*, p. 860

413 Youth Affairs Network of Queensland, Submission No. 415, p. S 2487

414 Sawyer, Transcript of Evidence, 9 July 1997, p. 855

415 *ibid*

416 Centre for Adolescent Health, Submission No. 41, p. S 234

417 Sawyer, Transcript of Evidence, 9 July 1997, p. 855

418 Centre for Adolescent Health, Submission No. 41, p. S 234

4.201 Concern was expressed that counsellors and social workers concentrate on the child's right to confidentiality rather than the child's welfare.[419] There are situations, however, in which the family's knowledge is not in the best interests of the child.[420] The younger the child and the more invasive the procedure the greater the need to fully investigate the issue of maturity but this should be up to the medical practitioner's discretion.[421]

> ... if I think a young person at the age of 16 is deemed to be sufficiently mature and responsible to consent to medical care and to consent to confidentiality then they should be equally deemed responsible that they are the one who decides whether their medical record should be viewed by a third party and not their parent.[422]

Access to appropriate information

4.202 In relation to Article 17, Austria, Indonesia, Turkey and the United Arab Emirates have made reservations and Algeria and Singapore have made declarations in relation to the compatibility with the basic rights of others, parental authority, the provisions of penal codes and constitutions and traditional and cultural values.[423] There were also a number of general reservations and declarations which could affect the implementation of this Article in other countries.

Television content

4.203 Issues relating to mass media are largely the Federal Government's responsibility although the States and Territories have certain responsibilities in relation to videos and educational programs.[424] Television provides an acceptable, familiar and almost universally available medium as children watch on average 21-22 hours of television per week. There was a call for more children's programs, appropriate religious and educational programs and programs to meet the linguistic needs of minority groups.

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419 Crockford, Transcript of Evidence, 4 August 1997, p. 1119

420 Sawyer, Transcript of Evidence, 9 July 1997, p. 857

421 *ibid*, p. 861

422 *ibid*, p. 859

423 The Convention on the Rights of the Child http:/www.un.org/depts/treaty/final/ts2/newfiles/part_boo/iv_boo/iv_11.html

424 Australian Children's Television Action Committee, Submission No. 112, p. S 539

Cultural and educational aspects

4.204 Australian Children's Television Action Committee (ACTAC) advocated a cultural component to children's television suggesting that TV provides an acceptable, familiar and almost universally available medium to promote the arts.[425]

> 98% of Australian homes have at least one TV set. 93% of Australian homes have a VCR. Children watch on average 21-22 hours of free-to-air TV per week. They also watch videos, play video games, watch pay TV, use computers and surf the Internet. They spend more time in these occupations than in any other activity but sleep. Very little of this material is made especially for children ... Some material for indigenous children is provided out of Alice Springs.[426]

4.205 The Children's Program Standards for free-to-air television cover only 5 hours a week plus the first release drama quota while children watch on average 21-22 hours of television per week.[427] Much of what they watch is self regulated by industry and not monitored by the Australian Broadcasting Authority (ABA) or any other children's body.[428]

4.206 Young Media Australia believed that Australia has in place mechanisms to encourage the dissemination of material of social and cultural benefit to the child but not in regard to the linguistic needs of children who belong to a minority group, or who are Indigenous.[429] The Catholic Commission for Justice, Development and Peace believed there should be an independent national broadcaster and that there is a continuing need for religious broadcast quotas and educational children's programs.[430]

> We view the importance of an independent national broadcaster, free from the conflict and temptations that popularity ratings and advertising provide, as essential in preserving diversity, a cross representation of views and democratic participation.[431]

4.207 The Ethnic Child Care, Family and Community Services Co-operative Ltd commented that:

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425 *ibid*, p. S 544

426 *ibid*, pp. S 547-8

427 *ibid*, p. S 542

428 Australian Children's Television Action Committee, Submission No. 112, p. S 542

429 Young Media Australia, Submission No. 88, p. S 424

430 Curran, Transcript of Evidence, 9 July 1997, p. 884

431 Catholic Commission for Justice, Development and Peace, Submission No. 201, p. S 1371

> ... parents do not have much choice in selecting TV programs which are non-violent, non-sexist and non-biased and stereotype people according to their appearance, class etc. Children's TV is not well developed in Australia where we have local productions which are relevant and reflect the Australian way of life.[432]

4.208 The Australian Broadcasting Authority develops quality quota systems for the commercial TV networks which is supplemented by the ABC's programs.[433] The ABA lack of power and punitive authority and the self-regulation of the industry make compliance difficult.[434]

> ACTAC argues that to comply with the Convention Australia must strengthen the role and function of the ABA, create more suitable material for children, including indigenous children, to view and educate children to become discerning and discriminating viewers.[435]

4.209 Medical Association for Prevention of War (Australia) would also like to see more information and material of social and cultural benefit to children.[436] Concern was raised as to the extent of the power given to media and the scope of material defined as 'cultural'.[437]

4.210 Young Media Australia commented that Australia's system of quality quotas for children's materials and pre-school programs is unique and envied by many countries.[438] However, programs specifically for children are less available because the commercial needs of media are cheap, effective and economical and the needs of children are not prominent in marketing.[439] Young Media Australia commented that the SBS rarely provide foreign language materials for children.[440]

Media reporting

4.211 Concerns were expressed about the presence of media in children's courts, the publication of children's names, the adverse effect of sensationalised

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432 Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, p. S 610

433 Young Media Australia, Submission No. 88, p. S 425

434 Australian Children's Television Action Committee, Submission No. 112, p. S 539

435 *ibid*

436 Medical Association for Prevention of War (Australia), Submission No. 403, p. S 2269

437 Endeavour Forum, Victorian Coordinator, Submission No. 15, p. S 60

438 Biggins, Transcript of Evidence, 4 July 1997, p. 767

439 Brindal, Transcript of Evidence, 4 July 1997, p. 761

440 Young Media Australia, Submission No. 88, p. S 425

media reporting on young people and the supply of incorrect information to the media.[441] Unsuitable visual material in news items should not be shown until the late news bulletins.[442]

4.212 Lutheran Community Care also commented on the inappropriate use of children in the media as part of advertising and in news stories. They were also concerned about 'obscene' broadcasting on radio and TV at hours when children have unmonitored access to the media.[443] They provided the example of two toddlers whose mother was murdered featuring in stories which were not appropriate for the children or their older siblings to see.[444]

4.213 Other examples included the media highlighting the fact that one child in 10 000 is harmed by the immunisation program, which can discourage parents from using the program and may result in the death of a number of children;[445] the irresponsible sensationalised representation of ethnic communities which encourages racial tension and can be detrimental to community relations;[446] and the use of models who border on anorexic:

> We admit the media has done a lot to cut out abuses like female genital mutilation and other things, but perhaps it is just one of those things where they were caught. We would not expect legislation on this but the convention does talk about guidelines.[447]

4.214 National Council of Women of Australia believed that:

> The media must act responsibly in their coverage of children's activities so that positive news is publicised in as real a manner as the damaging and negative news. This is rarely done in any area of the media and it is an area where the values and ethics of this industry must be reappraised as self-regulation appears to be inadequate. Similarly, the amount of violence shown on television, in computer games and on the internet is undesirable and voluntary restrictions have failed. The policing of the contents of these easily accessible

441 Youth Advocacy Centre Inc, Supplementary Submission No. 14a, p. S 1035

442 Australian Children's Television Action Committee, Submission No. 112, p. S 545

443 Lutheran Community Care, Submission No. 61, p. S 314

444 Lutheran Community Care, *Response to the Australian Law Reform Commission Re: Children and the Legal Process*, p. 3

445 Ford, Transcript of Evidence, 9 July 1997, p. 847; Caroline Chisholm Centre for Health Ethics, Submission No. 66, p. S 337

446 Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, p. S 670

447 Ford, Transcript of Evidence, 9 July 1997, p. 846

> technologies is one of the major new challenges which must be faced when we consider the rights of the child.[448]

Children as consumers

4.215 The Australian Children's TV standards state that advertising material must not deceive or mislead children but there is little testing of campaigns.[449] The recently established Advertising Standards Board is industry based, led by major advertisers and not an independent government funded body.[450] Young Media Australia were concerned that the highly targeted, highly sophisticated marketing campaigns are directed at children as they believed the industry is more creative at increasing the commercial thrust of programs than producing programs that benefit children.[451] Article 17 places an obligation on broadcasters and regulators to provide the protection required.[452]

> Australian children see 25 000 advertisements on free-to-air TV in any one of their formative years. Many of these are scary, out of context trailers, advocate poor nutrition show dangerous situations or violence. ACTAC re-iterate that the Australia Broadcasting Authority which has the responsibility for ensuring standards and censorship classifications are honoured, does none or insufficient monitoring of both advertisements and programs.[453]

4.216 Children need to be aware of the influence of the media and develop skills in being able to analyse the information and material received via media.[454] The Asian Summit on Child Rights and the Media resolved that government and non-government organisations should provide media education for children and families to develop their critical understanding of all media forms.[455]

4.217 The Taxi Employees League expressed the concern that:

> The issue with children as consumers is that they do not have the wisdom to understand the basic aspects of consumerism. They have been targeted by the

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448 National Council of Women of Australia Inc Ltd, Submission No. 451, p. S 2654

449 Young Media Australia, Submission No. 88, p. S 426

450 Australian Children's Television Action Committee, Submission No. 112, p. S 542

451 Biggins, Transcript of Evidence, 4 July 1997, p. 769

452 *ibid*, p. 775

453 Australian Children's Television Action Committee, Submission No. 112, p. S 542

454 South Australia Association for Media Education Inc, Submission No. 57, p. S 298

455 Asian Summit of Child Rights and the Media, Manila, 1995 cited in South Australia Association for Media Education Inc, Submission No. 57, p. S 298

> media, especially in advertising, and unless they have parents who can guide them into safe and good products then they can be subjected to exploitation.[456]

4.218 The Australian Broadcasting Tribunal's inquiry into television violence recommended strong support for media education by the State school system.[457] ACTAC believed that education programs should be compulsory for all senior primary school students.[458] Making young people more critically literate will place pressure on stations to lift their performance.[459] Many schools do not offer media type education.[460] Past governments have spoken about children's needs for media education but little has been done.[461]

Harmful materials

4.219 The Preamble to the Convention states that children are entitled to special care and assistance and places a responsibility on governments to:

> ... provide amongst other things media which is suitable for the various ages and stages of childhood, to recognise the effects on children of Television Violence and exploitation through advertising and to regulate to protect children in these areas.[462]

4.220 Medical Association for Prevention of War (Australia) would like to see stricter limits on violence in films, television and other media as Article 17(a) requires the States Parties to encourage the mass media to disseminate information and material of social and cultural benefit to children.[463]

4.221 Call to Australia expressed the concern that:

> The only restrictions allowed are those provided in law. While most parents may consider the magazines *Playboy*, *Penthouse* and *Picture* to be unsuitable for their children, the Commonwealth Government Office of Film and Literature Classifications has given all these publications an unrestricted classification. Children may therefore legally buy and read this type of pornography - just as they may legally buy and view M videos. Article 13 gives children the right to buy this legally available material, despite parental

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456 Davis, Transcript of Evidence, 9 July 1997, p. 825

457 South Australia Association for Media Education Inc, Submission No. 57, p. S 298

458 Australian Children's Television Action Committee, Submission No. 112, p. S 543

459 Brindal, Transcript of Evidence, 4 July 1997, p. 764

460 *ibid*, p. 765

461 *ibid*, p. 760

462 Australian Children's Television Action Committee, Submission No. 112, p. S 541

463 Medical Association for Prevention of War (Australia), Submission No. 403, p. S 2269

> wishes to the contrary ... The Commonwealth Government philosophy of 'self regulation' by the broadcasting networks relies heavily on parents to monitor and control their children's viewing and listening. The system cannot work if the Convention undermines parental authority in this area.[464]

4.222 It is the classification system that makes this material freely available to children rather than the Convention *per se*. Young Media Australia believed that the guidelines to protect children from injurious materials are not well enforced and there is insufficient attention paid to determining which materials are injurious and acting promptly on such determinations.[465]

4.223 Concerns were also raised that children could now obtain information about homosexual and lesbian activities, sex education in schools, blasphemous or other offensive material against the parents wishes.[466] Concerns were expressed that this Article may prevent parents from effectively controlling information available to their children and that the government should decide whether restrictions were necessary.[467]

4.224 The Parents and Friends Federation of Western Australia Inc believed that this article:

> ... is pretty broad and has all sorts of difficulties embedded in it. We think that article has the ability to render it impossible for parents to protect their children and manage their normal development by denying them access to instruction and raw materials which are harmful to them morally, physically or on religious or ethical grounds. Such materials could include, for example, unsuitable instruction or influencing their children in such areas as sex education, drug education and regarding homosexual and other lifestyles, which could in turn encourage or condone lifestyles and practices which are not only morally damaging but also physically damaging.[468]

4.225 Ms Krohn agreed that there were problem areas:

> ... when it says 'all kinds of information' seems to be floating free and, in fact, preventing parents from restricting any kind of access to information to their children at any age ... All kinds of interesting things seem to be encouraged within the CRC.
>
> Going back to those preambular sections and reading the document in the light of some of the other provisions, it is clear that the primacy of the family, as a

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464 Call to Australia, Submission No. 179, pp. S 1210-1

465 Young Media Australia, Submission No. 88, p. S 424

466 Francis C, *op cit*, pp. 3-4

467 The Australian Family Association Western Australia Division, Submission No. 39, p. S 218

468 Eastwood, Transcript of Evidence, 3 July 1997, pp. 610-1

> means by which these rights are not only acknowledged but are nurtured and developed, seems to us to be at least the strongest point of the CRC and something which can act as a useful corrective in Australia.[469]

4.226 The South Australian Child and Youth Health Council expressed concern about the potential impact of some pornography and other offensive material in the media and on the Internet on the mental health of children.[470] The John Plunkett Centre for Ethics in Health Care commented that the wording of Article 13:

> ... fails to recognise the seriousness of children having access to obscene and pornographic material. The later restriction of this right by a vague reference to "*public health and moral*" is no more than a shallow and insubstantial hint at the seriousness of the risks of exposing children to the harms of material which combines sexual explicitness with gross violence.[471]

4.227 There was support for children to learn about their sexuality and family planning through school-based programs.[472]

> We believe that children have the right to such information, and we support and encourage parents to be the primary providers ... Lack of such basic information impoverishes women, and can cause confusion, unhappiness and the harmful, physical consequences of choices made in ignorance.[473]

4.228 Tonti-Filippini *et al* commented that:

> *Prima facie* this completely overrides a parents right to guide or limit the material to which his or her child is to be exposed. This is relevant to the pornography debate and the recent Commonwealth Government decision to allow material unsuitable for children to be made available on cable television and other inadequately controlled methods of distribution of such material.[474]

4.229 Prior to ratification concern was expressed by the then Opposition that this right does not acknowledge the right and duty of parents to provide guidance to children on information they should receive in their formative years. [475] The Committee notes that governments already have restrictions on

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469 Krohn, Transcript of Evidence, 9 July 1997, p. 838

470 Castell-McGregor, Transcript of Evidence, 4 July 1997, pp. 693-4

471 John Plunkett Centre for Ethics in Health Care, Submission No. 160, p. S 1085

472 Billings Ovulation Method Council of Victoria Inc and Ovulation Method Research & Reference Centre of Australia Ltd, Submission No. 191, p. S 1316

473 *ibid*

474 Tonti-Filippini, Fleming, Fisher, Krohn and Coghlan, Submission No. 187, p. S 1274

475 Hill R, Adjournment United Nations Convention on the Rights of the Child, *Senate Hansard*, 7 November 1990, p. 3675

moral acceptability in relation to censor matters. Restrictions beyond these are considered a matter for parents to decide and implement.

4.230 The Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies has recently completed an inquiry into portrayal of violence in the electronic media and the recommendations are currently being considered by the Government.[476] The report recommended an improved complaints mechanism, increased monitoring, public, student and industry education, and changes in relation to the classification systems.[477]

4.231 The Australian Broadcasting Tribunal's 1989-90 report on TV Violence in Australia recommendations have not been implemented.[478] There are some provisions to protect children from harmful material but these are not well enforced.[479]

> Australia has in its statutes/standards/codes related to film, television, home videos, and computer games, many provisions deemed to protect children from harm. In practice, these often fail to do so.[480]
>
> ... too often the monitoring of where the harm is actually happening to kids is left to parent and children's groups, all of whom are very poorly resourced in terms of trying to remedy the situation against the weight of commercial media.[481]
>
> We believe that there are some provisions on paper but they are not based on an adequate understanding of child development nor on an adequate understanding of what materials are likely to be harmful to children at different ages and stages. So our concerns actually, to go into more detail, centre on the impact on children of an increasingly commercialised media environment with which they are developmentally not able to cope. There is insufficient understanding of how advertising, and which forms of advertising mislead, and deceive children.[482]
>
> There is little real knowledge in the industry of harmful types of media violence and vulnerable ages and stages of children, and there is very little real

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476 Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies *Report on the Portrayal of Violence in the Electronic Media*, February 1997

477 *ibid*, pp. iii-vi

478 Australian Children's Television Action Committee, Submission No. 112, p. S 541

479 Biggins, Transcript of Evidence, 4 July 1997, p. 768

480 Young Media Australia, Submission No. 88, p. S 425

481 Biggins, Transcript of Evidence, 4 July 1997, p. 768

482 *ibid*

> help for parents to understand and avoid those problematic types of materials.[483]

4.232 Young Media Australia commented that research on violence has shown that children are most influenced by other children performing violent acts or their heroes performing violent acts.[484]

> ... that provisions are there on paper but do not actually protect children. A very serious area of concern is that of home videos. Here we have a situation where the home video classification system is based on the principle that adults should be free to see and read what they want provided that children are protected from harm. It seems to us in Australia that it is always the case that adult freedoms are more important than children's rights to protection.[485]

4.233 Young Media Australia commented that action by the regulatory authorities is dependent on complaints from the community and that parents are mostly not familiar with the codes, standards and complaint mechanisms.[486] The complaints mechanisms is cumbersome and almost incomprehensible.[487] Resolution of complaints is slow and can take up to 15 months and the protection of children is not given priority.[488]

> Some "protections" on the statute books are virtually unenforceable, but are nevertheless touted as providing protection for children. For example, R rated videos may not be shown to children nor hired to them, nevertheless it has been established that many children of a young age are exposed to such videos. This is an example of where the principle that adults should be free to see what they wish directly conflicts with the rights of the child to be protected.[489]

4.234 Parents of NESB children may have difficulty in accessing information which is not translated into their language or is not in a form that they will understand if they are illiterate.[490]

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483 *ibid*, p. 769

484 *ibid*, p. 772

485 *ibid*, p. 770

486 Young Media Australia, Submission No. 88, p. S 426

487 Australian Children's Television Action Committee, Submission No. 112, p. S 543

488 Biggins, Transcript of Evidence, 4 July 1997, p. 769

489 Young Media Australia, Submission No. 88, p. S 426

490 Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, p. S 690

4.235 It was suggested that:

> The media could be challenged to provide written information, radio and TV programs to improve respect for and attitudes to children; enhance value systems and anti-bias strategies to counter racism and discrimination; to encourage peaceful parenting and coach parents and teachers how to give to, and get the best out of children.[491]

4.236 A large number of Australian children have access to the Internet: the Scout Association of Australia gave the example that they had over 19 000 entries per month to their Internet site.[492] Concern was raised in relation to pornography on the Internet which may be used in the seduction of children by adults.[493]

> ... every effort is being made to prevent children's access to unsuitable material on the internet, to protect children from the activities of paedophiles and to prevent access to violent films and videos.[494]

Name and nationality and preservation of identity

4.237 In addition to those countries which have general reservations and declarations, nine countries have placed reservations in relation to Article 7 and declarations have been made by Andorra, Kuwait and Monaco.[495] The concerns included the legal consequences of the acquisition and loss of nationality, parentless children, certain conditions of nationality, incompatibilities with the constitution, confidentiality in adoptions and prevailing practices.[496] No States Parties have placed reservations on Article 8 but Andorra has made a declaration relevant to its Constitution.[497]

Loss of Australian citizenship

4.238 The United Nations Committee on the Rights of the Child expressed its concern that, in Australia, children can be deprived of their citizenship if one of

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491 Jeremy, Submission No. 87, pp. 418-9

492 Keats, Transcript of Evidence, 9 May 1997, p. 468

493 De Lissa Institute of Early Childhood and Family Studies, Submission No. 146, p. 6

494 Child Health Council of South Australia, Supplementary Submission No. 151a, p. S 2383

495 The Convention on the Rights of the Child http:/www.un.org/depts/treaty/final/ts2/newfiles/part_boo/iv_boo/iv_11.html

496 *ibid*

497 *ibid*

their parents loses his/her citizenship[498] and about the measures being taken to ascertain that stateless refugee children are granted their right to a nationality.[499] Under the *Australian Citizenship Act 1948*, a child may cease to be an Australian citizen if a responsible parent ceases to be a citizen.[500]

4.239 While the Joint Standing Committee on Treaties appreciates the views of the United Nations Committee on the Rights of the Child and some members of the Australian community, we are also concerned that there must be a balance between the rights of individuals and immigration control measures. The Committee believes, however, that there would be a significant concern if the loss of Australian citizenship renders the child stateless.

Right to know parents

4.240 A number of submissions argued that the child must have access to information about his or her parents. The Human Rights Commissioner argued that access to information about semen donors is a human right and that laws which do not permit access to identifying information are in breach of the Convention.[501]

4.241 The Caroline Chisholm Centre for Health Ethics believed that:

> Children should not be legally denied their need to know, love and be loved by their own genetic parents. Many adopted children yearn to know their own biological parents whose non-involvement in their lives brings them suffering. Hence we believe natural justice requires legal access to reproductive technology be restricted to married or stable heterosexual couples. This may require changes in the sex discrimination and equal opportunity acts.[502]

4.242 Contemporary Australian practices in reproductive technologies have been ignoring the child's right to preserve his or her identity.[503] Sperm donors come from every walk of life but egg donors tend to be either women on an

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498 United Nations Committee on the Rights of the Child, *Concluding observations Australia* (CRC/C/SR 403-405), 24-25 September 1997, p. 2

499 Committee on the Rights of the Child Fifth Session, Pre-sessional Working Group, 27-31 January 1997, *Implementation of the Convention on the Rights of the Child, List of issues to be taken up in connection with the consideration of the initial report of Australia* (CRC/C/8/Add.31), p. 2

500 *Australia's First Report under the Convention on the Rights of the Child*, December 1995, p. 64

501 Sidoti, Transcript of Evidence, 5 August 1997, p. 1179

502 Ford, Transcript of Evidence, 9 July 1997, p. 844

503 John Plunkett Centre for Ethics in Health Care, Submission No. 160, p. S 1085

infertility program or relatives or friends of the couple receiving treatment.[504] In most cases donors have no say in who receives their gametes or the number of children produced from those gametes except where donations are by friend or family.[505]

> anonymous donation of sperm and ova mean that children born as the result of donor gametes will forever be denied one of the most crucial components in their sense of identity: knowledge of their biological parents.[506]

4.243 Children who are denied access to information about their biological parents are discriminated against.[507] Concern was also expressed that although many clinics now collect data on the biological parents in accordance with the new guidelines, many are using semen collected before these changes were introduced.[508]

4.244 The Australian Catholic Bishops' Conference is particularly concerned with the lack of formal regulation of artificial reproductive technology in the majority of states.[509]

> The related issues of access to ART, and claims upon estates of couples in same-sex relationships, have been highlighted by a series of recently decided cases, viz *Pearce v South Australian Health Commission,*[510] *W v G;*[511] *JM v QFG, GK & State of Queensland;*[512] *MW & ors v The Royal Women's Hospital & ors*[513]. These cases are important for a number of reasons:
>
> > (a) the majority of them involve awarding of damages against hospitals or other enterprises which did nothing more than comply with existing state law;

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504 National Executive Committee of the Donor Conception Support Group of Australia Inc, Submission No. 420, p. S 2518

505 *ibid*, p. S 2519

506 John Plunkett Centre for Ethics in Health Care, Submission No. 160, pp. S 1085-6

507 National Executive Committee of the Donor Conception Support Group of Australia Inc, Submission No. 420, p. S 2522

508 *ibid*

509 Australian Catholic Bishops Conference, Submission No. 174, p. S 1166

510 (1996) 66 SASR 486

511 (1996) 20 Fam LR 49

512 No H38 of 1996: reasons for the decision of R. Atkinson, President of the Queensland Anti-Discrimination Board

513 Human Rights and Equal Opportunity Commission ("the HREOC") (unreported 5 March 1997)

> (b) the court or tribunal, in each case, failed to consider the rights of any children who were born pursuant to IVF procedures ...[514]

4.245 The NHMRC's *Ethical guidelines on assisted reproductive technology* state that:

> Children born from the use of ART procedures are entitled to knowledge of their biological parents. Any person, and his or her spouse or partner, donating gametes and consenting to their use in an ART procedure where the intention is that a child be born must, in addition to the information specified in this section, be informed that children may receive identifying information about them." (Section 3.1.5)

4.246 However, the only people required to implement those guidelines are researchers funded by the NHMRC or the ARC for their research: unless reproductive technology clinicians are subject to State legislation, their activities are unregulated.[515]

4.247 The John Plunkett Centre for Ethics in Health Care would like to see the Commonwealth encourage the States to draw up the appropriate legislation.[516] In Victoria, a central registry keeps records indefinitely.[517] South Australia and Western Australia have legislation which safeguards the records of donors, and offspring may access non-identifying information for a limited time.[518] Elsewhere the keeping of records is not standardised and in most States there is no guarantee of access. This means that currently people born by donor conception in Australia do not have the right to know both biological parents.[519] The comment was also made that if adopted children have the right to know who their parents are, then so should children conceived in this manner.[520]

4.248 Tonti-Filippini *et al* added that:

> ... technology creates so many possible permutations and combinations for parenthood that the identity and status of the child may be confused and any relationships he or she has to parents, by which his or her rights would normally be protected in the first instance, may be fragmented, or never

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514 Australian Catholic Bishops Conference, Submission No. 174, pp. S 1166-7

515 John Plunkett Centre for Ethics in Health Care, Submission No. 160, p. S 1086; Tobin, Transcript of Evidence, 5 August 1997, p. 1162

516 John Plunkett Centre for Ethics in Health Care, Submission No. 160, p. S 1086

517 National Executive Committee of the Donor Conception Support Group of Australia Inc, Submission No. 420, p. S 2519

518 *ibid*, p. S 2519

519 *ibid*, pp. S 2520-1

520 *ibid*, p. S 2523

> actually formed. Reproductive technology has the capacity to produce children without parents who were never orphaned, but began as orphans. This is particularly true of the 25 000 or more Australian embryos left in storage awaiting some decision about whether they are to be transferred to a woman who would then become their gestational mother, left forever in cold storage neither dead nor fully alive, exported, experimented on, or destroyed.
>
> The matter of providing special legal protection to the child before birth, as it is expressed in the preamble, would at least warrant making provision for the child who is to be born in any attempt to legislate to give effect to the CRC.[521]

4.249 It was suggested that there should be mandatory record keeping by clinics and that these records should be kept indefinitely on a central register. This information should be available to the offspring at the age of 18 after appropriate counselling.[522] They also suggested that right of access to information should be retrospective on a voluntary basis and that future donors must be prepared to be identified to offspring.[523]

4.250 Australian Institute of Family Studies commented that:

> The evidence from adults whose 'name and family relations' have been inadequately protected, or actively concealed, while they were children, is very strong: policies require considerable sensitivity and balance to ensure that children maintain full links with family during their childhood.[524]

4.251 Other concerns included the father's name not being registered at the birth of the child thus denying the child this knowledge.[525] Pseudo adoption, where foster parents append their names to that of a child in care, is regarded by the Children's Commissioner of Queensland as serious contravention of Article 8 of the Convention.[526] The Child Abuse Prevention Service believed that governments should ensure that the relevant information is kept so every child has the right to know the identities of both natural parents.[527]

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521 Tonti-Filippini, Fleming, Fisher, Krohn and Coghlan, Submission No. 187, pp. S 1280-1

522 National Executive Committee of the Donor Conception Support Group of Australia Inc, Submission No. 420, p. S 2523

523 *ibid*

524 Australian Institute of Family Studies, Submission No. 363, p. S 2067

525 Kaye and Turner, Submission No. 21, p. S 93

526 Alford, Transcript of Evidence, 1 May 1997, p. 227

527 Child Abuse Prevention Service, Submission No. 26, p. S 164

Non-discrimination

4.252 The United Nations Committee on the Rights of the Child concluded that Article 2 is not being fully implemented in Australia.[528] All the States and Territories except for Tasmania have some form of age discrimination legislation.[529] These laws contain exceptions where it is legal to discriminate on the basis of age in relation to safety and protection of children, special benefits, reasonable age criteria, private schools, employment and awards and welfare measures and positive discrimination.[530]

4.253 The Ethnic Child Care, Family and Community Services Co-operative Ltd commented on the interstate differences in discrimination legislation and interpretations.[531] Tasmania's legislation only covers sex discrimination while that in New South Wales reflects the Commonwealth anti-discrimination legislation as well as discrimination on the grounds of age and sexuality.[532]

4.254 The Human Rights and Equal Opportunity Commission commented that:

> Age discrimination may be justified to protect younger children and compensate for their lack of experience, their physical immaturity and their vulnerability to exploitation. However, many laws and policies which discriminate against children because of their age cannot be justified by reference to these factors. Age is often used as an arbitrary factor in the formulation of laws and policies affecting the lives of children and it is often used not for their benefit but for detriment.[533]

4.255 It was submitted that the areas of discrimination against children include: junior wage rates where there is no training component; job advertisements where there is no nexus between the duties to be performed and the experience required; access to commercial premises; curfews; and actions against those seeking rental accommodation.[534]

4.256 Community Services Australia expressed their concern at the lack of resources for HREOC which monitors discrimination, suggesting it is a clear

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528 United Nations Committee on the Rights of the Child, *Concluding observations Australia* (CRC/C/SR 403-405), 24-25 September 1997, p. 2

529 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1939

530 *ibid*, pp. S 1939-40

531 Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, p. S 666

532 Attorney-General's Department, Supplementary Submission No. 133a, p. S 3363

533 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1938

534 *ibid*

example of Government's lack of commitment to the rights of its constituents.[535] Most non-discrimination measures still tend to be ad hoc with enormous variations from State to State.[536] Anti-discrimination measures must be implemented across the board for any real change in action and in attitude to occur.[537]

4.257 The NGOs believed that anti-discrimination legislation and government policies have not been adequately examined for their impact on children.[538] Tasmania lacks broad based anti-discrimination legislation and children in that State must rely on Commonwealth anti-discrimination law other than the *Sex Discrimination Act 1994*, but Constitutional limits on Commonwealth powers may mean this recourse is not always available.[539]

Discrimination on the basis of ethnic background

4.258 The Youth Affairs Network of Queensland (YANQ) submitted that NESB families do not access many of the services such as the anti-discrimination commission because of barriers such as language or they do not know they exist.[540] Information about the Commission must be provided in community languages.[541]

> There is certainly a huge role for youth support workers and government departments to ensure that funded services work cross-culturally and have access and equity policies in place and implemented.[542]

4.259 It was argued that the Convention was one of the few ways the YANQ can argue the rights of young people from non-English speaking backgrounds who are often not acknowledged in the mainstream of Australian society.[543]

> Policies of harassment and bullying aim to counter racist, gender-based and power inequities. Education, however, is a slow process and it may take generations to overcome behaviours such as overt and covert racism and other

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535 Community Services Australia, Supplementary Submission No. 154a, p. S 2388

536 *ibid*

537 *ibid*

538 Defence for Children International Australia, *op cit*, p. 15

539 Kaye and Turner, Submission No. 21, p. S 88

540 Ferguson, Transcript of Evidence, 6 August 1997, p. 1343

541 *ibid*

542 *ibid*, p. 1344

543 Carr, Transcript of Evidence, 6 August 1997, p. 1347

> destructive attitudes which children tend to bring with them from parental influences. Schools pursue these policies with varying degrees of vigour and energy, due to many competing demands for time and attention and strength of staff attitudes.[544]

4.260 The Ethnic Child Care, Family and Community Services Co-operative Ltd commented that:

> Ethnic and Aboriginal communities have always experienced some kind of discrimination, in either covert or overt forms. With the present rise in racist activities throughout Australia, we hope that the Convention will commit the government to take firm action against all forms of discrimination. This is important for ethnic communities in that, despite policies and statements by governments, children of immigrants are being discriminated against concerning language, culture and religion ... There is a need to acknowledge the diverse cultural, linguistic, religious, social and other practices of our diverse population and as far as possible acknowledge and accommodate these in their operations and structures.[545]

4.261 The Australian African Children's Aid and Support Association Inc also expressed the concern that the problem of racial discrimination and taunts directed towards non-white children within the Australian community.[546] There was a need for more community education in the areas of multiculturalism, racial harmony and an understanding of people from different cultures. [547]

4.262 The Free Kindergarten Association expressed the concern that:

> One of the problems that we see with the media and children's programs is that the baddie, if you like, the villain of the piece in many of the children's cartoons and video games is usually an Asian or black person. In the portrayal of people being the bad or the evil or the violent one, it is very important that we are not giving a stereotype image of that person - for instance, the person has to be Asian or black. I think that needs to be addressed in the media. There are also a lot of programs that are completely unsuitable.[548]

4.263 The Committee believes that there is more to be done in this area and urges the Government to develop more opportunities for NESB communities to comment during the development of policy and programs to ensure they are equitable and accessible to NESB people.

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544 Smith, Submission No. 117, p. S 561

545 Ethnic Child Care, Family and Community Services Co-operative Ltd, Submission No. 125, pp. S 665-6

546 The Australian African Children's Aid and Supports Association Inc, Submission No. 36, p. S 202

547 *ibid*

548 Clarke, Transcript of Evidence, 9 July 1997, p. 927

Discrimination on the basis of age

4.264 The Human Rights and Equal Opportunity Commission called for the implementation of national age discrimination legislation.[549] The *Human Rights and Equal Opportunity Commission Act 1986* does not make it unlawful to discriminate on the grounds of age and many complaints are not able to be conciliated, especially where the relevant legislation contains discriminatory provisions.[550] The Age Discrimination Task Force is considering a strategic framework and legislative and non-legislative options to deal with discrimination on the grounds of age.[551]

4.265 Australian Association of Paediatric Teaching Centres provided a number of examples of where children were not treated equitably. Drug companies do not always do trials to determine if drugs work on children and do not produce them in a form that is appropriate for children and children have died as a result of doctors miscalculating in preparing medication.[552] The case mix system also works against children by not acknowledging that children under the age of three need additional care.[553]

Discrimination on the basis of sex

4.266 The Youth Advocacy Centre Inc commented that there is an over-representation of boys in the juvenile justice system, but girls come into the system through other means such as health reasons, prostitution, care and control applications and sexual abuse. However, they are often over-looked because programs and orders that are developed for boys, are then adapted for girls which is unsuitable and irrelevant to their needs.[554] Girls appear to get harsher penalties because of the difference between how society expects them to behave, but boys who 'hang' in large groups are seen as 'gangs' and are perceived to be a problem and are targeted by police.[555] Also advocates and

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549 Human Rights and Equal Opportunity Commission, Submission No. 336, p. S 1940

550 *Australia's First Report under the Convention on the Rights of the Child*, December 1995, p. 39

551 *ibid*

552 Goodier, Transcript of Evidence, 3 July 1997, p. 625

553 *ibid*, p. 626

554 Youth Advocacy Centre Inc, Submission to ALRC and HREOC. *Speaking for Ourselves, Children and the legal process. Issues Paper 18*, July 1996, p. 24

555 *ibid*

courts do not appear to readily accept the sexual abuse of boys as they do of girls.[556]

The right to life, survival and development

4.267 The Preamble refers to the need for special protection of the child before as well as after birth and Article 6 requires that States Parties recognise that every child has the inherent right to life. The right to life is also recognised in Article 3 of the *Universal Declaration of Human Rights* and Article 6 of the *International Covenant on Civil and Political Rights.*

4.268 It was suggested that the other rights are meaningless to a child killed before birth and that the right to life is the paramount right[557] otherwise the Convention becomes a sham and a mockery of justice.[558] It was also argued that in Australia approximately one in four unborn children are killed by abortion[559] and it was suggested that it is a hypocrisy to ratify the Convention and then to slaughter 100 000 children annually.[560]

Australia's approach

4.269 Professor Kolosov stated that only the States Parties themselves can interpret the Convention and in the case of a conflict between the international community and a particular member, a definitive interpretation can only be made by a two-thirds majority and that all other interpretations are of an academic nature [561]

4.270 The *Travaux Preparatoires* side steps the issue of abortion and the issue was not resolved.[562] The 1988 Working Group considerations of Article 6 agreed not to reopen the discussion concerning the moment at which life begins.[563] Mr Kaye was of the view that while the vagueness of conventions creates problems in domestic law, in international law it is its strength because

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556 *ibid*

557 Right to Life Australia, Submission No. 422, p. S 2531

558 Focus on the Family Australia, Submission No. 60, p. S 310

559 Queensland Right to Life, Submission No. 346, p. S 1990

560 Egan, Transcript of Evidence, 3 July 1997, p. 641

561 Kolosov, Transcript of Evidence, p. 1531

562 Campbell, Transcript of Evidence, 28 April 1997, p. 34; Attorney-General's Department, Supplementary Submission No. 133a, p. S 3372

563 Detrick S, *op cit*, p. 121

it is often easier for the delegates to avoid a problem by couching it in such vague language that it addresses everybody's concerns. It was suggested that if they were resolved there would be a substantial lack of international support that may prevent the convention itself ever coming into force.[564]

4.271 The Committee notes that some countries have placed reservations and declarations in relation to the termination of pregnancies. Charlesworth and McCorquodale submitted that:

> the issue [of the unborn child] was left unsettled in the final text because of the impossibility of consensus. Various states have made reservations placing on record their understanding that CROC covers every child from conception. Thus Argentina has declared in relation to article 1 ... that:
>
> > the article must be interpreted to the effect that a child means every human being from the moment of conception up to the age of 18.
>
> In contrast the United Kingdom has declared that it
>
> > interprets the Convention as applicable only following a live birth.
>
> This type of reservation is quite permissible under the VCLT regime. It records one state's understanding of a deliberately vague provision.[565]

4.272 Australia's Report addresses the issue of abortion in paragraphs 229, 231, 235, 242 and 243. It was argued therefore that this indicated that Australia must have taken Article 6 as referring to the child both before and after birth.[566]

> ... by mentioning the abortion laws in connection with article 6(1), there is an implied admission by the Australian government that article 6(1) applies to the child before birth as well as after birth; otherwise there would be no reason whatsoever to mention the laws against abortion in this context at all.[567]

4.273 The Committee notes that the Russian Federation in raising the issue of abortion with the United Nations Committee on the Rights of the Child had the matter raised in the concluding comments.[568]

4.274 The Australian Catholic Bishops Conference commented that in common law there is a complex mass of decisions relating to unborn children which are

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564 Kaye, Transcript of Evidence, 4 August 1997, p. 1081

565 Charlesworth and McCorquodale, Supplementary Submission No. 92a, p. S 2568

566 Coalition for the Defence of Human Life, Submission No. 18, p. S 74

567 Egan, Transcript of Evidence, 3 July 1997, p. 639

568 The Committee on the Rights of the Child expressed its concern about the use of abortion as a method of family planning and the very high number of abortions in the Russian Federation CRC/C/15/Add.4 (February 1993)

often difficult to reconcile. The common law has not treated the unborn child as a legal person for all purposes.[569]

> ... the only thing all those who are recognised as (natural) persons have in common is that they are living individuals of the human species. in law there was added a further thing in common: that they were already born but that addition was made at a time when it could not be known, with any precision what was going on within the womb and whether it was alive or dead. Modern knowledge entitles and strongly suggests that the courts recognise, at least for the purposes of the most basic protection, that the unborn fully share the one thing common in reality: being living individuals of the human species ... the proper course is not to deny the legal personality of the unborn child because there are cases in which it is difficult to protect the rights of the unborn child.[570]

4.275 The Committee also notes that Article 6(1) uses the words 'inherent right to life' while it was submitted that the Government's approach was that this is the right to live once you are born.[571] There are jurisdictional inconsistencies in the law in relation to the unborn child and the differences are outlined in Australia's Report.[572]

4.276 It was argued that Article 6, which states that the child has 'the inherent right to life', could be used as the basis for an anti-abortion law. It has also been suggested, however, that Article 24 grants the right to family planning education and that this in United Nations terms has 'ordinarily included abortion on demand.[573]

4.277 Tonti-Filippini *et al* commented that:

> The CRC has been interpreted by many in such a way that the status of the unborn in regard to the widespread practice of abortion has been bracketed out. This was referred to in the Senate by the then Attorney-General and Senator Gareth Evans in 1991 relying upon the rules of interpretation of treaties and the character of Australia's interventions recorded in the travaux preparatoires which he argued had the effect of qualifying Australia's ratification of the CRC in this respect ... On the basis of the CRC and the other international human rights instruments in regard to the unborn child the

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569 High Court of Australia on appeal from the Supreme Court of New South Wales, No. S88 of 1996, S91 of 1996, Outline of submissions on behalf of the Australian Catholic Health Care Association and the Australian Catholic Bishops Conference on an application to be heard as *amicus curiae*, p. 27

570 *ibid*, p. 28

571 Barich, Transcript of Evidence, 3 July 1997, p. 642

572 *Australia's Report under the Convention on the Rights of the Child*, December 1995, pp. 50-3

573 Francis C, *op cit*, p. 6

> Australian situation of *de facto* abortion on demand and Commonwealth funding of that practice, in particular, ought not be permitted.[574]

4.278 Some argued that the child has inalienable rights before conception,[575] others stressed that the life of a child begins at the moment of conception[576] while others argued that the foetus becomes a child midway between the first and third semesters of pregnancy.[577]

4.279 The Family Law Council believed that the Convention must be read in the context of the preambular clauses which are background and the general principles and the articles are the specifics.[578] Some attempted to dismiss the phrases that relate to protecting the child's life before and after birth as preambular. The Committee believes that if an argument can be successfully maintained by the pro-convention groups that the preambular clause relating to the family is to be considered an integral part of the Convention, then this clause must also be considered in that context.

4.280 Dr Ford told the Committee that:

> I read it as referring to an inherent right to life, but I also noted the difference between this convention and the early declaration where phrases that spoke about protecting the unborn in the act of declaration were removed. Also, when it is talking about the care of the mother and her child, protection for the foetus was excluded, so I think this convention was designed not to exclude abortion.[579]

4.281 The Joint Standing Committee on Treaties believes that it would be difficult to amend the Convention as suggested by Call to Australia as this would require a two thirds majority of States Parties.[580] The Endeavour Forum recommended that the Commonwealth Government legislate in relation to

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574 Tonti-Filippini, Fleming, Fisher, Krohn and Coghlan, Submission No. 187, p. S 1280

575 Billings Ovulation Method Council of Victoria Inc and Ovulation Method Research & Reference Centre of Australia Ltd, Submission No. 191, p. S 1315

576 For example the *Charter of the Rights of the Family*, presented by the Holy See to all persons, institutions and authorities concerned with the mission of the family in today's world, 22 October 1983, Catholic Truth Society, Publisher to the Holy See, London, appendix to Australian Catholic Bishops Conference, Submission No. 174; Right to Life Australia, Submission No. 422, p. S 2531; Ferrari, Submission No. 164, p. S 1100

577 Evans, Submission No. 388, p. S 2179

578 Boland, Transcript of Evidence, 5 August 1997, p. 1278

579 Ford, Transcript of Evidence, 9 July 1997, pp. 845-6

580 Call to Australia, Submission No. 179, p. S 1212

abortion.[581] However, the Committee notes, that this is traditionally an area of State and Territory jurisdiction.

4.282 Concern was expressed that abortion on demand was freely available across Australia. The Caroline Chisholm Centre for Health Ethics commented that:

> Communities change over time. A practice that a particular community rejects at one point as being morally repugnant may later become accepted in that same community as morally appropriate ... The situation of abortion is an excellent example. In 1969 the Menhennett ruling created a category of lawful abortions but this category was quite strictly defined. Today in Victoria, without any change at all to the law, we have the equivalent to abortion on demand ... Creating a rather narrow category of lawful abortions has allowed the community to accept as reasonable a far wider range of abortions.[582]

4.283 Ms Phelan commented in relation to abortion that:

> ... if abortions are going to occur they are for reasons that sit within the Menhennett ruling. Part of the problem with the availability of abortions in private settings is that the reasons women are giving for abortions may not necessarily actually meet that ruling or be sufficient even for socially recognised reasons. So perhaps part of the responsibility to ensure, to the maximum extent possible, the survival and development of the child could be to ensure that if there are going to be abortions, they are going to be for extenuating circumstances rather than the current system we have at the moment.[583]

> ... you would have to have social change. Because of the acceptance of abortion in this country no legislative change at this stage would practically affect that but it certainly could prompt us to review the way in which abortion is provided or the way in which we fund abortion or provide access to it or educate about it. I think that would be the first step.[584]

Late term abortions

4.284 Particular concern was expressed in relation to late term abortions.[585] The State Council of the Presbyterian Women's Association expressed concern

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581 Endeavour Forum, Submission No. 8, p. S 27

582 Caroline Chisholm Centre for Health Ethics, Supplementary Submission No. 66a, p. S 2552

583 Phelan, Transcript of Evidence, 9 July 1997, p. 846

584 Krohn, Transcript of Evidence, 9 July 1997, p. 836

585 Catholic Women's League Archdiocese of Canberra and Goulburn, Submission No. 86, p. S 414; Howard, Submission No. 639, pp. S 3210-1

at the trend in Australia to perform abortions at 20 plus weeks and requested that the baby's right to life should be recognised adequately in law before birth and adoption instead of death arranged for these children.[586]

Pre-natal screening programs

4.285 The Coalition in Defence of Life recommended that the Commonwealth should cease funding of discriminatory pre-natal screening programs.[587] This contravenes Article 2 which relates to non-discrimination and Article 23 of the Convention states that a mentally or physically disabled child should enjoy a full and decent life.

4.286 Right to Life Australia suggested that these tests are discriminatory because as there is no cure available, the object of these tests is to offer parents a chance to have their imperfect unborn destroyed.[588]

> ... the increased resort to abortion for foetal disability. According to the report released in March 1997 on congenital malformations, the abortions for foetal disability jumped from 421 in 1991 to 718 in 1994. This is largely as a result of blood serum screening programs that are being endorsed by health departments in every state and territory and result in near universal screening of pregnancies.[589]

4.287 Many disabilities cannot be detected before birth and even those that can, the severity of such cannot be determined for some years.[590] Queensland Right to Life argued that the limitations of the equipment are not explained and a lot of pressure is placed on women to have an abortion.[591] They added that the first trimester can be an emotionally turbulent time and women can be subjected to undue pressure to abort their child but given enough emotional support they may be managed over these times.[592]

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586 State Council of the Presbyterian Women's Association, Submission No. 358, p. S 2043

587 Egan, Transcript of Evidence, 3 July 1997, p. 640

588 Right to Life Australia, Submission No. 422, p. S 2531

589 Egan, Transcript of Evidence, 3 July 1997, p. 639

590 Queensland Right to Life, Submission No. 346, p. S 1990

591 *ibid*

592 *ibid*, pp. S 1990-1

Health of the mother

4.288 Professor Kolosov commented that:

> On the issue of abortion, for example, the committee members believe that it is harmful to the health of a girl child and early pregnancies are a problem in many countries. Early pregnancies very often prevent girl children from going to school. Early pregnancies are not conducive to the child's care or to the health of the babies of young girls if the pregnancy is too early. It prevents the girl child from active participation in the life of society.[593]
>
> So the committee, when discussing these issues, takes into consideration the two sides of early pregnancies - that the abortion is physically harmful and that giving birth to a child at a too early age is harmful. It is a controversial issue, but all of that is the interpretation of the respective article dealing with the health care of children and their physical integrity. Again, this is a matter of interpretation.[594]

4.289 Tonti-Filippini *et al* commented that:

> These issues concern matters such as care and support given to women who are pregnant, for the sake of the child they carry. For instance, pregnant women who are substance abusers, whether legal or proscribed substances, need special attention to facilitate rehabilitations and monitoring of their health so that the child is not born disabled. Some of the States in the US have "right to be born well" legislation.[595]

4.290 Another issue raised in relation to the unborn child is the health of the mother. Tonti-Filippini *et al* commented that:

> Given the danger to the child, the priority would also seem to be to gain the woman's confidence in the care and support being offered rather than to prosecute for substance abuse ... the trauma of a mother's prosecution is not in the best interests of the baby, nor is it in the best interests of her baby for her to avoid seeking help for fear of prosecution.[596]

4.291 However, the Caroline Chisholm Centre for Health Ethics suggested that:

> If adequate financial and, in particular, emotional assistance were offered to parents of disabled children perhaps these parents would be less inclined to go

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593 Kolosov, Transcript of Evidence, 3 September 1997, pp. 1531-2

594 *ibid*, p. 1532

595 Tonti-Filippini, Fleming, Fisher, Krohn and Coghlan, Submission No. 187, p. S 1260

596 *ibid*, p. S 1279

> through the harrowing experience of opting to abort their handicapped children.[597]

4.292 The Committee is conscious of the need for some women to have abortions in situations where the mother's life is at risk. The Australian Reproductive Health Alliance opposes attempts to give legally enforceable rights to the foetus because of the implications for women who may seek an abortion.[598]

4.293 It was suggested that the Commonwealth cease funding abortions through Medicare.[599] It was also argued that the Commonwealth breached the Convention in that:

> The Commonwealth is presently engaged in providing Medicare rebates for abortions. In 1995/96 the Commonwealth paid $135,502 towards 826 procedures involving "induction and management of second trimester labour", the intentional abortion of a child of 14-26 weeks gestation and $10,014,157 towards 77,551 procedures involving "evacuation of the contents of the gravid uterus by curettage or suction curettage", ie the intentional abortion of a child by sucking or scraping it from the pregnant uterus.[600]

4.294 This decision can only be made by the doctors treating the women. Women in these situations should not be deprived of access to Medicare benefits. The Committee does not therefore believe that this service should be removed from the Medicare schedule.

4.295 The Committee does believe, however, that there are other mechanisms by which the number of abortion can be reduced. These include the provision of adequate support so that decisions based on the perception of lack of support can be avoided.

4.296 The Committee also notes the comment by UNICEF that:

> The Committee on the Rights of the Child has suggested that reservations to preserve State laws on abortion are unnecessary. But the Committee has commented adversely on the high rates of abortion, on the use of abortion as a method of family planning and on 'clandestine' abortions, and has encouraged measures to reduce the incidence of abortion.[601]

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597 Caroline Chisholm Centre for Health Ethics, Submission No. 66, p. S 366

598 Australian Reproductive Health Alliance, Submission No. 121, p. S 603

599 For example, the Australian Family Association Tasmanian Branch, Submission No. 70, p. S 358

600 Coalition for the Defence of Human Life, Submission No. 18, p. S 75

601 Hodgkin R and Newell P (1998) *Implementation Handbook for the Convention on the Rights of the Child*, United Nations Children's Fund, p. 4

Teenage pregnancy

4.297 The Australian Reproductive Health Alliance (ARHA) believed that a number of articles imply that children are entitled to age appropriate sexuality education, however, this is not currently always available and is patchy.[602] ARHA stated that the rate of teenage pregnancy in Australia is 21 per 1000 for women aged 15-19 based on the 1990 to 1995 figures.[603] ARHA saw the role of sex education as discouraging young people from engaging in practices that may be harmful to their physical or psychological health.[604]

4.298 The Standing Committee of Attorneys-General is considering the abortion issue in the development of the Model Criminal Code.

Survival and development

4.299 Other issues will be dealt with in Chapter 7 which are relevant to the survival and development of the child and include the mortality rate in Aboriginal children, children with disabilities and youth suicide.

The Committee's views

4.300 The debate in relation to the autonomous child would have been more appropriate at the time the *Convention on the Rights of the Child* was being developed. It is now largely of an academic nature provided that the States Parties implement the Convention in a manner which supports the role of parents and the family unit. The Committee supports the Government's approach to the implementation of the Convention which acknowledges the family as the fundamental unit of our society and supports the role of parents in providing guidance and direction to children. The Committee believes that it is counter-productive to continue this debate because it emphasises the extreme interpretations of some articles in the Convention at both ends of the spectrum and may create disharmony within some family units.

4.301 The Convention was signed by the Executive on behalf of the Government and therefore the Government has an obligation to support families in caring for children and young people. The Convention, while it may serve as

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602 Australian Reproductive Health Alliance, Submission No. 121, p. S 604

603 United Nations Population Division's *World Population Prospects: The 1994 revision* cited in Australian Reproductive Health Alliance, Submission No. 121, p. S 604

604 Australian Reproductive Health Alliance, Submission No. 121, p. S 605

an appropriate model for good parenting, does not bind parents in the same way. The Government should only intervene in family situations where it can be shown that parents are not fulfilling their role adequately or that such intervention is beneficial to the individuals within the family and to the maintenance of the family unit.

4.302 We also believe that more should be done to alleviate parents' concerns that the Convention could be interpreted in a manner to impact significantly on the day to day activities within the family unit. We therefore support the introduction of an education campaign to alleviate the concerns of parents in relation to the implementation of the Convention.

4.303 The Committee is sympathetic to those who see the Convention as anti-parent, based on the rights given to children in Articles 13 to 16 and we can appreciate how these concerns arose. We note, however, that these rights are already available to children under other Conventions.

4.304 We believe that, in administrative and legal dealings with government and other bodies, these rights should be acknowledged and that this can be achieved in a manner that does not undermine the family as the fundamental unit of Australian society.

4.305 The Committee also believes that parents have the responsibility, duty and the right to provide guidance to their children in these matters. In all but very exceptional cases, parents are in the best position to determine the child's maturity and guide their decisions in these matters.

4.306 The Committee notes that the concept of 'best interests' of the child already exists in some domestic legislation as a paramount consideration. We are concerned, however, at the extent to which some 'best interests' decisions have had disastrous results for the young people and the families involved. We believe that as a matter of urgency the Government should investigate the extent of the problem and develop appropriate initiatives to assist those working with children to apply this principle.

Recommendation 1

The Joint Standing Committee on Treaties recommends that the Government request the Standing Committee of Community Services and Income Security Administrators investigate the need to clarify the interpretation and application of the 'best interests' principle.

4.307 In relation to the freedom of religion, we encourage a whole of Australia approach in planning religious ceremonies for public occasions. The

Committee notes the work being undertaken by the leaders of Australia's religious groups developing a common approach.

4.308 The Committee supports the approach of the First National Summit on Police and Ethnic Youth relations in attempting to improve the relations between these groups. We would like to see a national approach taken with other youth groups such as Indigenous young people. Groups such as these should be invited to participate in monitoring and the preparation of Australia's next report to the United Nations Committee on the Rights of the Child.

4.309 Of concern, also, is the issue of rights to privacy. While children should have this right, this situation must be looked at closely in circumstances where the child is at risk. If welfare institutions or health officials withhold information from parents and care givers, this must be in the child's best interest. In situations where there are allegations of abuse at home, the matter should be investigated thoroughly and the parents should be consulted. In cases where families are wishing to assist children and the children are not deemed to be at risk, there should be a sound basis for authorities to withhold information about the child's whereabouts and welfare.

4.310 The Committee would not like to see an absolute requirement that parents be informed that a child is seeking medical advice or treatment. We believe that this may cause some children not to seek help and thus place them in danger. However, where appropriate, children should be encouraged to involve their parents. The Committee believes the Government should look at possible inconsistencies between Commonwealth, State and Territory legislation to ensure that this cannot be used to the detriment of children's welfare.

Recommendation 2

The Joint Standing Committee on Treaties recommends that the Government request the Standing Committee of Attorneys-General investigate and remedy the inconsistencies between legislation in different jurisdictions that may adversely impact on children.

4.311 The Committee also believes that more can be done to ensure that children's names are not published in circumstances that would be detrimental to the child's best interests.

Recommendation 3

The Joint Standing Committee on Treaties recommends that the Government request the Standing Committee of Attorneys-General address jurisdictional inconsistencies in relation to the publication of children's names in circumstances that would be detrimental to the child's best interest.

4.312 The Committee believes that more can be done in relation to the assessment of harm to children in terms of violence in television programs, inappropriate advertisements and the content of news stories that might be shown when children are viewing. Existing guidelines should be monitored and enforced and consideration should be given to their adequacy in protecting children.

Recommendation 4

The Joint Standing Committee on Treaties recommends that the appropriate industry organisations monitor and encourage responsible reporting in the preparation of news stories in relation to the potential impact on children.

Recommendation 5

The Joint Standing Committee on Treaties recommends that the Government monitor, assess the adequacy of and enforce existing guidelines to provide greater protection for children viewing television.

Recommendation 6

The Joint Standing Committee on Treaties recommends that the Government monitor and control the content of advertisements designed to appeal to children.

Recommendation 7

The Joint Standing Committee on Treaties recommends that the Government establish an effective and timely complaints mechanism in relation to television programs and advertisements.

4.313 The Committee believes that all clinics and institutions involved in reproductive technologies should be required to keep detailed relevant identifying information on gamete donors. Until the issue of whether parental information should be provided to the offspring is resolved, unless this information is kept, this will not be an option for those children.

Recommendation 8

The Joint Standing Committee on Treaties recommends that the Government request that information identifying gamete donors be registered in all jurisdictions.

4.314 The Committee believes that there is still a great deal more to be done in relation to the implementation of Article 2 of the Convention on non-discrimination. There is a need to ensure that legislation at both levels of government adequately protects children.

Recommendation 9

The Joint Standing Committee on Treaties recommends that the Government request the Standing Committee of Attorneys-General to review legislation to ensure that there is no exploitation on the basis of age.

Recommendation 10

The Joint Standing Committee on Treaties recommends that the Government request the Standing Committee of Attorneys-General to review legislation, policies and practices to ensure that children in all jurisdictions are adequately protected.

4.315 Areas where there still appears to be discrimination against children include wage rates, job advertisements, access to premises, curfews and in seeking rental accommodation.

4.316 There is also a need for greater community acceptance of the multicultural nature of our society.

Recommendation 11

The Joint Standing Committee on Treaties recommends that the Government investigate educative initiatives apart from to the formal complaints mechanisms which can address racial discrimination against children evident in the community.

4.317 We believe that the Federal Government can do more to consult with NESB and Indigenous sections of the community in developing programs and policies and in activities such as the preparation of Australia's reports on compliance with international treaties.

Recommendation 12

The Joint Standing Committee on Treaties recommends that the Government formally seek input into policy formulation from Non-English Speaking Background and Indigenous sections of the community in the development mainstream programs which may be accessed by those groups.

Recommendation 13

The Joint Standing Committee on Treaties recommends that the Government formally seek input into the preparation of Australia's reports on compliance with international treaties from Non-English Speaking Background and Indigenous sections of the community.

Recommendation 14

The Joint Standing Committee on Treaties recommends that the Government review its policies and practices to ensure that programs and services are accessible to children from Non-English Speaking and Indigenous backgrounds.

4.318 The Committee also notes a number of significant improvements in recent years which enable young people to be heard in administrative and legal proceedings. We believe, however, that the Government should look at additional ways in which young people can be consulted during the development of policies and program which are relevant to their well-being.

Recommendation 15

The Joint Standing Committee on Treaties recommends that the Government encourage children and young people to have input into the development of policies and programs that affect them.

4.319 The Committee notes that the Standing Committee of Attorneys-General is currently considering the issue of abortion in the development of the Model Criminal Code and their findings will be available this year. We believe, however, that more could be done to support parents faced with this decision to avoid decisions based on a perceived lack of support.

Recommendation 16

The Joint Standing Committee on Treaties recommends that the Government investigate the adequacy of support services to enable women to contemplate alternatives to abortions.

4.320 We would also like to see an appropriate education campaign developed to attempt to reduce the number of teenage pregnancies which result in abortions.

Recommendation 17

The Joint Standing Committee on Treaties recommends that the Government investigate how abortions can be avoided through appropriate sex education in schools.